

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

MARCH 27, 2019

**MAILING ADDRESS: The Judicial Department
P. O. Box 2170, Raleigh, N. C. 27602-2170**

**THE COURT OF APPEALS
OF
NORTH CAROLINA**

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COURT OF APPEALS

CASES REPORTED

FILED 7 FEBRUARY 2017

Burns v. Kingdom Impact Global Ministries, Inc.	724	State v. Brody	812
Fagundes v. Ammons Dev. Grp., Inc.	735	State v. Cholon	821
Holmes v. Associated Pipe Line Contractors, Inc.	742	State v. Downey	829
In re D.E.P.	752	State v. Frazier	840
In re Foreclosure of Collins	764	State v. Glisson	844
Jackson/Hill Aviation, Inc. v. Town of Ocean Isle Beach	771	State v. McLean	850
Perry v. Bank of Am., N.A.	776	State v. Parisi	861
Reed v. Carolina Holdings	782	State v. Rogers	869
		State v. Wilson-Angeles	886
		T & A Amusements, LLC v. McCrory	904
		Tropic Leisure Corp. v. Hailey	915

CASES REPORTED WITHOUT PUBLISHED OPINIONS

Abdin v. CCC-Boone, LLC	925	In re Wadsworth	926
Bizzarro v. Cty. of Ashe	925	In re Y.L.M.C.	926
Bruns v. Bryant	925	In re Z.A.W.	926
Cramer v. Perry	925	Parker v. Colson	926
Dawkins v. Wilmington Tr. Co.	925	State v. Adams	926
Edwards v. Cole	925	State v. Arnold	926
G.S.C. Holdings, LLC v. McCrory ...	925	State v. Brockington	926
In re C.A.W.	925	State v. Cesnik	926
In re D.A.W.	925	State v. Crowder	926
In re E.C.	925	State v. Hargett	926
In re Foreclosure of Iannucci	925	State v. Rogers	926
In re H.S.	925	State v. Symmes	927
In re J.H.	925	State v. Thompson	927
In re P.M.	925	State v. Weaver	927
In re R.D.	925	Terry v. State of N.C.	927
In re S.C.H.	926	Weston Medsurg Ctr., PLLC v. Blackwood	927
In re T.Y.	926		

HEADNOTE INDEX

APPEAL AND ERROR

Appeal and Error—interlocutory orders and appeals—exclusivity provisions of Workers’ Compensation Act—substantial right—The denial of a motion concerning the exclusivity provision of the Workers’ Compensation Act affects a substantial right and thus is immediately appealable. **Fagundes v. Ammons Dev. Grp., Inc., 735.**

Appeal and Error—mandate—issued immediately upon filing—Pursuant to N.C. R. App. P. 32(b), the Court of Appeals directed that the mandate issue immediately upon the filing of an opinion where there was an error in sentencing and the possibility that defendant would be entitled to immediate release on resentencing because she would have served her entire sentence. **State v. Wilson-Angeles, 886.**

APPEAL AND ERROR—Continued

Appeal and Error—preservation of issues—attorney fees—failure to raise issue before Industrial Commission—Defendants’ appeal of the Industrial Commission’s award of attorney fees in a workers’ compensation case was dismissed. There was no indication in the record that defendants raised the issue before the Commission and there was no indication that the Commission addressed the issue. **Reed v. Carolina Holdings, 782.**

Appeal and Error—preservation of issues—general motion to dismiss—one aspect of evidence argued—The question of the sufficiency of evidence of conspiracy to traffic in opium (oxycodone) was preserved for appellate review where counsel made a general motion to dismiss all charges at trial but only argued a single aspect of the evidence. **State v. Glisson, 844.**

CITIES AND TOWNS

Cities and Towns—operation of airport—motion to dismiss—judicial notice of municipal ordinances improper—The trial court erred in a contract dispute case, arising out of the operation of a small airport, by allowing defendant town’s motion to dismiss. The town’s ordinance was not mentioned in the complaint, and courts cannot take judicial notice of the provisions of municipal ordinances. Even if the ordinance could be considered at the pleadings stage, plaintiff asserted waiver and estoppel arguments that would preclude judgment as a matter of law. **Jackson/Hill Aviation, Inc. v. Town of Ocean Isle Beach, 771.**

CONSPIRACY

Conspiracy—trafficking in opium—multiple transactions—The evidence in the record supported charges of multiple conspiracies to traffic in opium (oxycodone) even though defendant contended that the evidence showed multiple transactions indicating one conspiracy. The evidence was sufficient to support a reasonable inference that defendant and a coconspirator planned each transaction in response to separate, individual requests by the buyers and completed each plan upon the transfer of money for oxycodone. **State v. Glisson, 844.**

Conspiracy—trafficking in opium—person accompanying defendant—The evidence, though circumstantial, was sufficient to withstand defendant’s motion to dismiss a charge of conspiracy to traffic in opium (oxycodone). It would be reasonable for the jury to infer that the person who accompanied defendant to the transactions was present at defendant’s behest to provide safety and comfort to defendant during the transaction. **State v. Glisson, 844.**

CONSTITUTIONAL LAW

Constitutional Law—effective assistance of counsel—concessions in argument—Defendant’s counsel was not per se ineffective in a prosecution for first-degree sexual offense and indecent liberties with a child where his counsel maintained his innocence and did not expressly admit all of the elements of the crimes, although counsel made some concessions in his argument. **State v. Cholon, 821.**

Constitutional Law—small claims court—Virgin Islands—no counsel allowed—due process—full faith and credit—A judgment from the small claims division of the Virgin Islands Superior Court was not entitled to full faith and credit

CONSTITUTIONAL LAW—Continued

in North Carolina because it was obtained in a manner that denied defendant due process. Defendant was not allowed to be represented by counsel in small claims court, which was the only stage at which facts were determined; could not opt out of small claims court; and appeal from small claims court involved only legal issues. **Tropic Leisure Corp. v. Hailey, 915.**

CRIMINAL LAW

Criminal Law—defenses—voluntary intoxication—evidence not sufficient—Defendant was not entitled to a voluntary intoxication instruction in an arson prosecution where there was evidence that defendant was intoxicated to some degree, but the evidence did not establish how much alcohol defendant had consumed prior to committing the crime or the length of time over which defendant had consumed alcohol. The uncertainty about defendant's level of intoxication plus defendant's purposeful manner of carrying out the crime and her reaction when law enforcement approached her did not support the conclusion that defendant was so completely intoxicated as to be utterly incapable of forming the requisite intent. **State v. Wilson-Angeles, 886.**

Criminal Law—motion for appropriate relief on appeal—ineffective assistance of counsel—no prejudice—Defendant's motion for appropriate relief on appeal, based on a claim for ineffective assistance of counsel, was denied where there was overwhelming evidence of his guilt and he did not meet his burden of showing that, but for his counsel's statements in closing argument, the result of the proceeding would have been different. **State v. Cholon, 821.**

DAMAGES AND REMEDIES

Damages and Remedies—N.C.G.S. § 45–36.9—debtor relief—statutory damages—attorney fees—court costs—The trial court did not err by dismissing plaintiffs' claim for violation of N.C.G.S. § 45–36.9 that permits a debtor to seek statutory damages, attorney fees, and court costs if a creditor fails to record a satisfaction when required to do so. The complaint, on its face, failed to allege any point at which the line of credit had a zero balance and plaintiffs requested that the bank record a satisfaction. **Perry v. Bank of Am., N.A., 776.**

DECLARATORY JUDGMENTS

Declaratory Judgments—justiciability—electronic sweepstakes—The trial court erred by granting defendants' motion to dismiss a claim for declaratory and injunctive relief on the grounds of justiciability where a promotional rewards program was deemed to have the elements of an illegal electronic sweepstakes. Uncertainty about whether the rewards program violated North Carolina's gambling and sweepstakes statutes impacted plaintiffs' ability to operate a business. **T & A Amusements, LLC v. McCrory, 904.**

Declaratory Judgments—motion to dismiss—actual dispute—fraud—The trial court erred by dismissing plaintiffs' claim for declaratory judgment. Plaintiffs alleged an actual dispute over whether they were obligated to pay balances on lines of credit which they contended were the result of fraud. **Perry v. Bank of Am., N.A., 776.**

DISCOVERY

Discovery—late discovery requests—protective order—sanctions—The trial court did not abuse its discretion in a quiet title action by entering a sanctions order and a protective order. It was within the trial court's discretion to determine the scope of the sanctions order with respect to later discovery requests. **Burns v. Kingdom Impact Global Ministries, Inc., 724.**

DRUGS

Drugs—maintaining a vehicle for drugs—sufficiency of evidence—continuous maintenance or possession of the vehicle—The trial court should have dismissed a charge of maintaining a vehicle for keeping or selling a controlled substance where the evidence failed to demonstrate continuous maintenance or possession of the vehicle by defendant beyond the period of time he was surveilled on the afternoon of his arrest, or to show that defendant had used the vehicle on a prior occasion to keep or sell drugs. **State v. Rogers, 869.**

EVIDENCE

Evidence—detectives' opinion—defendant as drug dealer—There was no plain error in a prosecution for maintaining a vehicle for keeping or selling a controlled substance and related offenses where defendant contended that detectives offered improper opinions to the effect that defendant was a drug dealer. The detectives expressed their own experience and observations in ordinary testimony. **State v. Rogers, 869.**

Evidence—hearsay—police informant—background of investigation—There was no plain error in a prosecution for maintaining a vehicle for keeping or selling a controlled substance and related offenses where defendant alleged that the trial court admitted hearsay evidence by allowing a detective to testify about information collected from non-testifying witnesses. It was clear that the testimony at issue was not introduced to prove defendant's guilt but to establish the background and reasons for the detective's investigation. **State v. Rogers, 869.**

Evidence—hearsay—what a jailer told the witness—not offered to prove the truth of the matter—no prejudice—There was no error in a prosecution for armed robbery and other offenses where a witness testified that a jailer had told her that defendant was in the jail cell next to hers. The challenged testimony was not offered to prove the truth of the matter asserted but to explain why the witness was afraid to testify. Even if the testimony amounted to hearsay, there was no plain error in light of substantial evidence of defendant's guilt. **State v. McLean, 850.**

Evidence—officer vouching for witness—not prejudicial—There was error, but not plain error, in a prosecution for armed robbery and other offenses where an officer testified that the victim "seemed truthful." The officer vouched for the veracity of the witness, but there was no prejudice in light of other corroborating evidence. **State v. McLean, 850.**

Evidence—prior bad act—admissible—The trial court did not err in an arson prosecution by admitting evidence of a prior arson where the evidence was sufficiently similar, logically relevant, and not too remote in time. The trial court did not abuse its discretion by determining that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence, given the similarities of the two incidents and the trial court's deliberate determination of the admissibility of the testimony. **State v. Wilson-Angeles, 886.**

EVIDENCE—Continued

Evidence—prior investigations and warrants—context of investigation—police conduct—There was no plain error in a prosecution for maintaining a vehicle for keeping or selling a controlled substance and related offenses in the admission of testimony that defendant had been the subject of prior investigations and had outstanding warrants. The testimony was not admitted to demonstrate that defendant was guilty of any offenses but to explain the context of the police investigation and the detectives' conduct. **State v. Rogers, 869.**

INDICTMENT AND INFORMATION

Indictment and Information—discharging a firearm within an enclosure—improperly worded—An indictment was insufficient to confer jurisdiction where it attempted to charge defendant with discharging a firearm *within* an enclosure to incite fear, N.C.G.S. § 14-34.10, but instead alleged that defendant discharged a firearm *into* an occupied structure. **State v. McLean, 850.**

Indictment and Information—indictment amendment—substantial alteration—negligent child abuse—The trial court committed reversible error in a negligent child abuse case by permitting the State to amend the indictment. The indictment amendment constituted a substantial alteration and alleged conduct that was not set forth in the original indictment. **State v. Frazier, 840.**

JURISDICTION

Jurisdiction—standing—trustees—quiet title action—The trial court did not err by concluding that plaintiffs had standing in a quiet standing action in their capacities as the Trustees of Parks Chapel. **Burns v. Kingdom Impact Global Ministries, Inc., 724.**

JUVENILES

Juveniles—dispositional order—Level 3—training school—The trial court did not abuse its discretion by imposing a Level 3 disposition that committed a juvenile to a training school for a minimum of six months and a maximum not to exceed his eighteenth birthday. The juvenile continued to violate his probation even after being given another chance to continue on a Level 2 disposition. Difficult family circumstances and the fact that the juvenile successfully completed some of the requirements of probation did not support a conclusion that the trial court's decision was unreasonable. **In re D.E.P., 752.**

Juveniles—dispositional order—sufficiency of findings of fact—The trial court did not err by allegedly failing to include appropriate findings of fact in a juvenile dispositional order. The trial court was not required by N.C.G.S. § 7B-2512 to make findings of fact that expressly tracked each of the statutory factors listed in N.C.G.S. § 7B-2501(c). Even so, the order did in fact demonstrate the court's consideration of the statutory factors. **In re D.E.P., 752.**

MORTGAGES AND DEEDS OF TRUST

Mortgages and Deeds of Trust—deed of trust—foreclosure sale—power-of-sale provision—affidavit of default—holder of note—The trial court did not err by authorizing substitute trustee (Trustee Services of Carolina, LLC) to proceed with a foreclosure sale in accordance with the power-of-sale provision of the Deed of

MORTGAGES AND DEEDS OF TRUST—Continued

Trust. Beneficial Financial I Inc.'s (Beneficial) Assistant Secretary of Administrative Services' affidavit of default was properly admitted into evidence, and the trial court properly concluded that Beneficial was the holder of the Note. **In re Foreclosure of Collins, 764.**

MOTOR VEHICLES

Motor Vehicles—impaired driving—motion to suppress—district court—appeal to appellate division—governing statute—An appeal in a driving while impaired case was governed by N.C.G.S. § 20-38.7 and N.C.G.S. § 15A-1432 where the superior court did not grant defendant's motion to suppress but only affirmed the district court's preliminary determination and again later affirmed the district's court's final order. **State v. Parisi, 861.**

Motor Vehicles—impaired driving—motion to suppress—district court—appellate division jurisdiction—The Court of Appeals lacked jurisdiction to hear the State's appeal on defendant's motion to suppress in a DWI prosecution. The State does not possess a statutory right to appeal to the appellate division from a district court's final order granting defendant's pretrial motion to suppress evidence. While the district court order in this case was labeled "Preliminary Order of Dismissal," this heading was mere surplusage, as the district's court's written order granted only the motion to suppress, and neither the record nor the written order indicated that defendant also made a pretrial motion to dismiss under N.C.G.S. § 20-38.6(a) or that the district court addressed a dismissal motion. **State v. Parisi, 861.**

REAL PROPERTY

Real Property—quiet title action—motion for summary judgment—sufficiency of evidence—The trial court did not err in a quiet title action by granting plaintiffs' motion for summary judgment. The undisputed evidence demonstrated that the deed from Parks Chapel to Kingdom Impact was invalid. **Burns v. Kingdom Impact Global Ministries, Inc., 724.**

ROBBERY

Robbery—sufficiency of evidence—taking of property—The trial court did not err by denying defendant's motion to dismiss a charge of robbery with a dangerous weapon where there was substantial evidence that defendant took personal property from the victim's person or presence. **State v. McLean, 850.**

SEARCH AND SEIZURE

Search and Seizure—motion to suppress evidence—residence—search warrant—confidential informant—probable cause—The trial court did not err in a drug trafficking case by denying defendant's motion to suppress evidence obtained from his residence pursuant to a search warrant. The search warrant application relying, principally on information obtained from a confidential informant, was sufficient to support a magistrate's finding of probable cause. **State v. Brody, 812.**

Search and Seizure—traffic stopped—extended—reasonable suspicion—A traffic stop was not unduly extended, and defendant's motion to dismiss was properly denied, where the officer had reasonable suspicion to detain defendant due to defendant's nervous behavior; defendant's use of a particular brand of powerful air

SEARCH AND SEIZURE—Continued

freshener favored by drug traffickers; defendant's prepaid cellphone; the fact that defendant's car was registered to someone else; defendant's vague and suspicious answers to the officer's questions concerning what he was doing in the area; and defendant's prior conviction on a drug offense. **State v. Downey, 829.**

SENTENCING

Sentencing—early release condition—payment of State's expert witness expenses—no authority—The trial court erred in a prosecution for armed robbery and other offenses by requiring defendant, as a condition of early release or post-release supervision, to pay the expenses of the State's expert witness. There did not appear to be any statutory authority for the requirement. **State v. McLean, 850.**

Sentencing—prior record level—notice—The trial court erred by adding a prior record level point attributable to the time she spent on probation, parole, or post supervision where the State failed to give proper notice of its intention to use the probation point in the calculation of defendant's sentence. **State v. Wilson-Angeles, 886.**

WORKERS' COMPENSATION

Workers' Compensation—attendant care compensation—sufficiency of findings—reasonable and necessary—The Industrial Commission did not err in a workers' compensation case by awarding attendant care compensation. The Commission's findings of fact were supported by competent evidence and supported the Commission's conclusion of law that the services were reasonable and necessary. **Reed v. Carolina Holdings, 782.**

Workers' Compensation—jurisdiction—exclusive remedy—strict liability claim against employer—Woodson claim—inherent danger—ultrahazardous occupation—The trial court lacked jurisdiction to adjudicate plaintiff employee's strict-liability claims against defendant employer. Plaintiff employee was injured in a work-related accident, and the Workers' Compensation Act provided the exclusive remedy for his injuries. The portion of *Woodson* addressing jurisdiction under the Workers' Compensation Act did not depend on the inherent danger of the occupation. **Fagundes v. Ammons Dev. Grp., Inc., 735.**

Workers' Compensation—lack of jurisdiction—mandatory drug test in another state before work—last act to form employment contract—The Industrial Commission did not err in a workers' compensation case by denying plaintiff employee's claim based on lack of jurisdiction. The employee's submission to a mandatory drug test in another state before beginning work constituted the last act necessary to form an employment contract between the employee and her employer. **Holmes v. Associated Pipe Line Contractors, Inc., 742.**

Workers' Compensation—liability of co-employee—supervisor—failure to show willful, wanton, or reckless actions—The trial court erred by denying defendant supervisor Albino's motion for summary judgment on plaintiff employee's claim under *Pleasant v. Johnson*, 312 N.C. 710. Plaintiff employee did not forecast any evidence showing that Albino's actions while supervising the blast were willful, wanton, or reckless. **Fagundes v. Ammons Dev. Grp., Inc., 735.**

SCHEDULE FOR HEARING APPEALS DURING 2019
NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks in 2019:

January 14 and 28

February 11 and 25

March 11 and 25

April 8 and 22

May 6 and 20

June 3

July None Scheduled

August 5 and 19

September 2 (2nd Holiday), 16 and 30

October 14 and 28

November 11 (11th Holiday)

December 2

Opinions will be filed on the first and third Tuesdays of each month.

BURNS v. KINGDOM IMPACT GLOBAL MINISTRIES, INC.

[251 N.C. App. 724 (2017)]

GEORGE BURNS, MACK McCANN AND CHARLES BARTLETT,
TRUSTEES OF PARK'S CHAPEL FREE WILL BAPTIST CHURCH, PLAINTIFF(S)

v.

KINGDOM IMPACT GLOBAL MINISTRIES, INC., DEFENDANT

No. COA15-1313

Filed 7 February 2017

1. Discovery—late discovery requests—protective order—sanctions

The trial court did not abuse its discretion in a quiet title action by entering a sanctions order and a protective order. It was within the trial court's discretion to determine the scope of the sanctions order with respect to later discovery requests.

2. Jurisdiction—standing—trustees—quiet title action

The trial court did not err by concluding that plaintiffs had standing in a quiet standing action in their capacities as the Trustees of Parks Chapel.

3. Real Property—quiet title action—motion for summary judgment—sufficiency of evidence

The trial court did not err in a quiet title action by granting plaintiffs' motion for summary judgment. The undisputed evidence demonstrated that the deed from Parks Chapel to Kingdom Impact was invalid.

Appeal by Defendant from orders entered 18 December 2014 by Judge Richard T. Brown and 19 June 2015 by Judge Tanya T. Wallace¹ in Cumberland County Superior Court. Heard in the Court of Appeals 24 May 2016.

Yarborough, Winters & Neville, P.A., by J. Thomas Neville, for Plaintiffs-Appellees.

James H. Locus, Jr., for Defendant-Appellant.

INMAN, Judge.

1. The order below incorrectly spells Judge Wallace's name as Judge Tonya T. Wallace.

BURNS v. KINGDOM IMPACT GLOBAL MINISTRIES, INC.

[251 N.C. App. 724 (2017)]

Kingdom Impact Global Ministries, Inc. (“Defendant” or “Kingdom Impact”) appeals from the 19 June 2015 order granting a motion for summary judgment in favor of George Burns, Mack McCann, and Charles Bartlett, in their capacity as trustees of Parks Chapel Free Will Baptist Church (collectively “Plaintiffs”), as the rightful title holder to several tracts of land located at 868 Amye Street in Fayetteville, North Carolina. Defendant also appeals the trial court’s 18 December 2014 order imposing sanctions for Defendant’s failure to respond to Plaintiffs’ discovery requests. Defendant argues that Plaintiffs lacked standing, and that the trial court erred in imposing discovery sanctions and granting Plaintiffs’ motion for summary judgment because there existed genuine issues of material facts. After careful review, we affirm the trial court’s discovery sanctions and summary judgment orders.

Factual History

This appeal arises out of the disputed ownership of real property located at 868 Amye Street, in Fayetteville, North Carolina (“the Property”). The Property, conveyed seventy years ago to the trustees of Free Will Baptist Church, is comprised of several tracts of land and includes a church sanctuary. Over the years, parishioners deeded various tracts of land to the “Trustees of the Freewill Baptist Church and their successors” and later to the “Trustees of Parks Chapel Free Will Baptist Church and their successors.” The church was affiliated with the United American Free Will Baptist Denomination (the “Denomination”).

The tracts central to this dispute, where the sanctuary is sited, have been historically identified as Lots 12, 13, and 14 according to the plat of “Mac’s Park.” In 1947, Emily McMillan conveyed Lots 13 and 14 by deed to the trustees of Freewill Baptist Church to be used for church purposes. In 1967, Mabel McNeill conveyed Lot 12 by deed to the trustees of Free Will Baptist Church to be used by the Denomination.

Contained within the 1947 deed conveying Lots 13 and 14 to Free Will Baptist Church is the following restrictive language:

TO HAVE AND TO HOLD, the aforesaid lots of land and all privileges and appurtenances thereto belonging, to the said parties of the second part, and their successors in office, to their only use and behoof for so long as said property is used only for church purposes, and no longer, upon the trust, nevertheless, that said property be held by the parties of the second part, and their successors in office, for the sole use, benefit, and enjoyment of said FREEWILL

BURNS v. KINGDOM IMPACT GLOBAL MINISTRIES, INC.

[251 N.C. App. 724 (2017)]

BAPTIST CHURCH, its successors and assigns.

The 1967 deed conveying Lot 12 to Free Will Baptist Church includes the following restrictive language:

In trust that said premises shall be used, maintained and disposed of as a place of Divine worship for the use of the United American Free Will Baptist Church in America, subject to the discipline, usage, and ministerial elections of said church, as may be authorized and declared from time to time by the General Conference of said church and the Annual Conference in whose bounds the premises are situated.

In 1984, the trustees of Free Will Baptist Church conveyed Lots 13 and 14 to the trustees of Parks Chapel Free Will Baptist Church (“Parks Chapel”) as successor to Free Will Baptist Church. It is undisputed that the church simply changed its name at that time. It is also undisputed that the trustees of Free Will Baptist Church, for reasons that do not appear in the record, did not convey title in Lot 12 to the trustees of Parks Chapel when they conveyed Lots 13 and 14 when the church changed its name.

In 1999, Parks Chapel became incorporated under North Carolina law as a registered charitable or religious nonprofit corporation. The corporate bylaws required that the church be governed by the Book of Discipline of the Denomination, stating “this local church shall maintain its’ [sic] affiliation with the United American Freewill Baptist Denomination and agrees to recognize and be governed by the United American Freewill Baptist Discipline”

On 3 April 2009, at the conclusion of a worship service, then acting pastor of Parks Chapel, William Thomas Ford (“Pastor Ford”), held a conference meeting to propose withdrawing Parks Chapel from the Denomination and the regional conference to which it was assigned, Cape Fear Conference B (the “Conference”). The parties submitted conflicting evidence before the trial court regarding whether notice of the meeting was provided, who was permitted the opportunity to vote on the withdrawal, and the outcome of a vote held during the meeting.

A month later, on 8 May 2009, Pastor Ford sent a letter to the Denomination and the Conference notifying them that Parks Chapel was withdrawing its membership and would cease paying dues.

In February 2010, Pastor Ford signed Articles of Incorporation for Kingdom Impact, which were filed with the North Carolina Secretary

BURNS v. KINGDOM IMPACT GLOBAL MINISTRIES, INC.

[251 N.C. App. 724 (2017)]

of State's Office, declaring Kingdom Impact a non-profit religious organization. In May 2010, Frances Jackson, identified as a trustee of Parks Chapel, signed Articles of Merger of Parks Chapel Freewill Baptist Church, Inc. into Kingdom Impact Global Ministries, Inc. with the Secretary of State's Office. The affidavit testimony before the trial court however, challenged whether the merger was properly voted on by the members of Parks Chapel.

In June 2010, one month after the Articles of Merger were filed, the Denomination appointed Nathaniel Jackson as the Interim Pastor of Parks Chapel. The members of Parks Chapel who had opposed the withdrawal from the Denomination continued their affiliation with the Denomination and met for worship at the sanctuary on the Property until Defendant denied them access to the Property.

On 12 September 2011, Frances Jackson signed a deed transferring title of the Property from the trustees of Parks Chapel to the trustees of Kingdom Impact. This deed expressly transferred Lots 13 and 14 of Mac's Park, but does not mention Lot 12. Unlike the 1984 deed conveying the Property from the trustees of Free Will to the trustees of Parks Chapel, which was signed by all church trustees, no one other than Ms. Jackson signed the 2011 deed. Plaintiffs dispute that Ms. Jackson was a trustee of Parks Chapel at that time. Plaintiffs contend that Kingdom Impact, claiming ownership and control of the Property based on the deed, dispossessed Plaintiffs of the Property and prevented them from continuing to worship there.²

Procedural History

Plaintiffs filed a civil action on 12 November 2013 alleging that Kingdom Impact was not authorized to transfer title to the Property and sought to quiet the title for their claims to the Property as the trustees of Parks Chapel. Plaintiffs also filed notice of *lis pendens* with the Clerk of Court in Cumberland County. Defendant filed an answer and counterclaim to quiet title in the Property.

Discovery Disputes

In 2014, several months after commencing this action, Plaintiffs served Defendant with interrogatories and a request for production of

2. The record indicates that by 2009, when Pastor Ford proposed and took a vote to withdraw from the Denomination, Parks Chapel's parishioners were gathering for worship at 2503 Murchison Road, Fayetteville, North Carolina, a location different from the Property. The real property at the Murchison Road address is not at issue in this appeal.

BURNS v. KINGDOM IMPACT GLOBAL MINISTRIES, INC.

[251 N.C. App. 724 (2017)]

documents. Defendant failed to respond within the time allowed and did not seek an extension of time to respond. Plaintiffs sought responses without success before filing a motion to compel discovery. The trial court entered a consent order on 14 October 2014 (“Consent Order”) requiring Defendant “to produce full and accurate responses[,]” and “produce all documents responsive” to Plaintiffs’ discovery request within forty-five days.

Defendant served Plaintiffs with discovery responses on 20 November 2014. Instead of providing factual responses to each interrogatory, Defendant objected to many of the interrogatories as “over broad and vague.” Plaintiffs argued the response was inadequate and filed a motion to show cause and sanctions. The trial court entered an order on 18 December 2014 (“Sanctions Order”) finding that “Defendant has failed to fully respond to the Plaintiffs’ discovery requests and Orders of this [c]ourt” and required that Defendant provide substantive responses no later than 19 January 2015. The Sanctions Order also prohibited Defendant from offering in evidence, at trial or in any motion, any documents responsive to the discovery requests which were not tendered to Plaintiffs by 19 January 2015.

On 20 January 2015, Defendant served Plaintiffs with a request for admissions. Plaintiffs moved for a protective order from the request on the basis that as a result of the Sanctions Order, Defendants would be prohibited from introducing in evidence any admissions obtained after 19 January 2015. The trial court granted the motion in a protective order entered 27 February 2015 (“Protective Order”).

Motions for Summary Judgment

The parties then filed cross motions for summary judgment. The motions were heard over multiple sessions of court in which counsel disputed the legal merits as well as the admissibility of various affidavits.³ The trial court took the matter under advisement. On 19 June 2015, the trial court entered an order granting Plaintiffs’ motion for summary judgment and denying Defendant’s motion for summary judgment. Defendant timely appealed.

3. Defendant filed with its motion an affidavit by Francis Jackson dated 17 April 2015. Plaintiffs filed a motion to strike the affidavit on the grounds that it violated the 18 December 2014 discovery sanctions order. The trial court overruled the motion to strike and permitted the affidavit. When counsel appeared for the second session of the hearing, counsel disputed the admissibility of additional affidavits, including two that were filed but not served before the second hearing. The trial court overruled all objections and allowed the affidavits.

BURNS v. KINGDOM IMPACT GLOBAL MINISTRIES, INC.

[251 N.C. App. 724 (2017)]

Analysis**I. Discovery Sanctions**

[1] Defendant argues the trial court erred in the Sanctions Order and in the Protective Order by expanding the scope of the sanctions beyond the language of the Sanctions Order. Specifically, Defendant asserts that the facts do not support the trial court's finding that Defendant substantially violated any of the discovery rules and that the Sanctions Order did not preclude Defendant from pursuing discovery after 19 January 2015. We conclude that the trial court did not abuse its discretion in entering either the Sanctions Order or the Protective Order.

A. Sanctions Order

The imposition of sanctions under Rule 37 for failure to comply with discovery requests and orders is a matter within the sound discretion of the trial court and cannot be overturned on appeal absent a showing of abuse of discretion. *Bumgarner v. Reneau*, 332 N.C. 624, 631, 422 S.E.2d 686, 690 (1992) (citation omitted). "An abuse of discretion may arise if there is no record evidence which indicates that [a] defendant acted improperly, or if the law will not support the conclusion that a discovery violation has occurred." *In re Pedestrian Walkway Failure*, 173 N.C. App. 254, 264, 618 S.E.2d 796, 803 (2005) (citations omitted). The specific choice of sanctions imposed by the trial court is likewise within its sound discretion. *Brooks v. Giesey*, 106 N.C. App. 586, 592, 418 S.E.2d 236, 239 (1992) (citation omitted). As an appropriate sanction for a failure to comply with a discovery order, Rule 37(b) explicitly grants the trial court authority to "refus[e] to allow the disobedient party to support or oppose designated claims or defenses, or prohibit[] the party from introducing designated matters in evidence" and to "require the party failing to obey the order to pay the reasonable expenses, including attorney's fees[.]" N.C. Gen. Stat. § 1A-1, Rule 37(b) (2015).

Here, the record is replete with information supporting the Sanctions Order. Defendant failed to respond to Plaintiffs' initial discovery requests for three months, leading to a consent order being entered in favor of Plaintiffs. While Defendant did serve Plaintiffs with discovery responses within the designated timeframe of the Consent Order, the record shows the responses failed to produce complete factual information and asserted objections that had long been waived. *See Golding v. Taylor*, 19 N.C. App. 245, 248, 198 S.E.2d 478, 480 (1973) ("[I]n the absence of an extension of time, failure to object to interrogatories

BURNS v. KINGDOM IMPACT GLOBAL MINISTRIES, INC.

[251 N.C. App. 724 (2017)]

within the time fixed by the rule is a waiver of any objection . . . ”); N.C. Gen. Stat. § 1A-1, Rule 33 (2015) (“[t]he party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories . . .”).

Defendant argues the trial court abused its discretion by not making findings of fact and conclusions of law regarding how its responses were deficient or inconsistent with the Consent Order. Defendant fails to cite any authority supporting the contention that a trial court is required to make findings regarding specific discovery violations when imposing sanctions against a party. Contrary to Defendant’s assertion, Rule 52(a)(2) of the North Carolina Rules of Civil Procedure states that “findings of fact and conclusions of law are necessary on decisions of any motion . . . only when requested by a party . . .” N.C. Gen. Stat. § 1A-1, Rule 52(a)(2) (2015). Our Supreme Court has held it is within the discretion of the trial court “whether to make a finding of fact if a party does not choose to compel a finding through the simple mechanism of so requesting.” *Watkins v. Hellings*, 321 N.C. 78, 82, 361 S.E.2d 568, 571 (1987) (“It has been held repeatedly by this Court that ‘[w]hen the trial court is not required to find facts and make conclusions of law and does not do so, it is presumed that the court on proper evidence found facts to support its judgment.’”) (alteration in original) (quoting *Estrada v. Burnham*, 316 N.C. 318, 324, 341 S.E.2d 538, 542 (1986)). The record here does not reveal that Defendant asked the trial court to make factual findings.

We hold the trial court did not abuse its discretion by precluding Defendant from offering into evidence documents not produced before the aforementioned date.

B. Protective Order

Defendant further argues that the trial court exceeded the scope of the Sanctions Order by entering the Protective Order, preventing Defendant from obtaining admissions from Plaintiffs. Defendant asserts that this sanction amounts to a bar on Defendant’s ability to pursue discovery. This argument is without merit. Defendant had ample opportunity to seek discovery prior to 19 January 2015. The Protective Order was an effectuation of the Sanctions Order, which provided a further extension of time to Defendant to provide long past due discovery responses. It was within the trial court’s discretion to determine the scope of the Sanctions Order with respect to later discovery requests. Accordingly, the trial court did not abuse its discretion in entering the Protective Order.

BURNS v. KINGDOM IMPACT GLOBAL MINISTRIES, INC.

[251 N.C. App. 724 (2017)]

II. Standing

[2] Defendant also challenges Plaintiffs' standing to bring this action in their capacities as the "Trustees of Parks Chapel." Defendant argues Plaintiffs ceased to be Trustees of Parks Chapel on 6 May 2010 following the merger of Parks Chapel into Kingdom Impact, and that because of this cessation Plaintiffs were divested of standing. We disagree.

Defendant's argument misinterprets the capacity in which Plaintiffs bring this suit. Defendant asserts that Parks Chapel ceased to exist following the merger, and that Plaintiffs could not possibly have brought suit on behalf of a non-entity. But Plaintiffs' complaint specifically states the suit is being brought by Plaintiffs as trustees of Parks Chapel, a "non-incorporated entity." Defendant concedes in its answer and counterclaim that Plaintiffs were trustees of Parks Chapel at all relevant times. Regardless of the validity of the merger and the incorporation status of Parks Chapel, Plaintiffs have the ability to bring a suit as trustees of a non-incorporated religious organization seeking to assert property rights. *See* N.C. Gen. Stat. §§ 59B-4, 59B-5, 59B-15, and 61-2 (2015).

Although Defendant presented evidence by affidavit before the trial court that raises a factual dispute about Frances Jackson's status as a trustee of Parks Chapel, Defendant presented no evidence raising a factual dispute regarding Plaintiffs' status as trustees of Parks Chapel. Plaintiffs' claim is not dependent upon them comprising all of the trustees of Parks Chapel, but merely upon Defendant's failure to obtain the consent of all trustees to transfer the Property.

For more than two centuries, Chapter 61 of the North Carolina General Statutes has provided special protections for real property owned by churches. N.C. Gen. Stat. § 61-2 provides that "[t]he trustees and their successors have power to . . . take and hold property, real and personal, in trust for such church or denomination, religious society or congregation; and they may sue or be sued in all proper actions, for or on account of the . . . property so held or claimed by them" N.C. Gen. Stat. § 61-3 (2015) provides, *inter alia*:

All glebes, lands and tenements, heretofore purchased, given, or devised for the support of any particular ministry, or mode of worship, and all churches and other houses built for the purpose of public worship, and all lands and donations of any kind of property or estate that have been or may be given, granted or devised to any church or religious denomination, religious society or congregation

BURNS v. KINGDOM IMPACT GLOBAL MINISTRIES, INC.

[251 N.C. App. 724 (2017)]

within the State for their respective use, shall be and remain forever to the use and occupancy of that church or denomination, societies or congregations . . . and the estate therein shall be deemed and held to be absolutely vested, as between the parties thereto, in the trustees respectively of such churches, denominations, societies and congregations, for their several use, according to the intent expressed in the conveyance

North Carolina statute recognizes that real property can be held by an unincorporated association. “Real and personal property in this State may be acquired, held, encumbered, and transferred by a nonprofit association, whether or not the nonprofit association or a member has any other relationship to this State.” N.C. Gen. Stat. § 59B-4. N.C. Gen. Stat. § 59B-15(a) further states that “[n]othing in this Chapter changes the law with reference to the holding and conveyance of land by the trustees of churches under Chapter 61 of the General Statutes where the land is conveyed to and held by the trustees.” Plaintiffs, as trustees of Parks Chapel, are asserting a claim for real property held by them in trust for Parks Chapel. Accordingly, we hold Plaintiffs have standing to bring this quiet title action.

III. Summary Judgment

[3] Lastly, Defendant argues that the trial court erred in granting Plaintiffs’ motion for summary judgment because there existed before the trial court some evidence that raised genuine issues of material fact. We disagree.

An appeal from an order granting summary judgment is reviewed *de novo* by this Court. *Andresen v. Progress Energy, Inc.*, 204 N.C. App. 182, 184, 696 S.E.2d 159, 160 (2010) (citation omitted). “Summary judgment is appropriate when there is no genuine issues as to any material fact and any party is entitled to a judgment as a matter of law.” *Id.* at 184, 696 S.E.2d at 160-61 (internal quotation marks and citations omitted). “[A]n issue is genuine if it is supported by substantial evidence, and . . . is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action[.]” *DeWitt v. Eveready Battery Co., Inc.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002) (internal quotation marks and citations omitted). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and means more than a scintilla or a permissible inference[.]” *Id.* (internal quotation marks and citations omitted).

BURNS v. KINGDOM IMPACT GLOBAL MINISTRIES, INC.

[251 N.C. App. 724 (2017)]

“The party moving for summary judgment bears the burden of establishing that there is no triable issue of material fact.” *Id.* (citing *Nicholson v. Am. Safety Util. Corp.*, 346 N.C. 767, 774, 488 S.E.2d 240, 244 (1997)). “The movant may meet this burden by proving that an essential element of the opposing party’s claim is non-existent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim.” *Collingwood v. General Elec. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989) (citations omitted). Once this burden is met, the nonmoving party must “produce a forecast of evidence demonstrating that the [nonmoving party] will be able to make out at least a prima facie case at trial” to avoid dismissal. *Id.* (citation omitted). “All inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion.” *Id.* (citing *Page v. Sloan*, 281 N.C. 697, 190 S.E.2d 189 (1972)).

“In order to establish a *prima facie* case for removing a cloud on title, a plaintiff must meet two requirements: (1) plaintiff must own the land in controversy, or have some estate or interest in it; and (2) defendant must assert some claim in the land which is adverse to plaintiff’s title, estate or interest.” *Chicago Title Ins. Co. v. Wetherington*, 127 N.C. App. 457, 461, 490 S.E.2d 593, 597 (1997) (citing *Wells v. Clayton*, 236 N.C. 102, 107, 72 S.E.2d 16, 20 (1952)).

Here, Defendant failed to show any genuine issue as to material facts existed or that Plaintiffs were not entitled to judgment as a matter of law. Defendant argues that there remain questions regarding: (1) whether “corporate formalities” were followed by Defendant related to the merger with Parks Chapel, including whether adequate notice was provided prior to the meeting to vote on the withdrawal from the Denomination; (2) whether a sufficient majority of the congregation of Parks Chapel actually voted to withdraw from the Denomination and the Conference; and (3) whether Frances Jackson, as a trustee of Parks Chapel, had authority to sign the deed transferring the title from Parks Chapel to Defendant.

Plaintiffs, as trustees of Parks Chapel, have standing to bring this action pursuant to N.C. Gen. Stat. §§ 59B-4, 59B-5, 59B-15, and 61-2, regardless of the validity of the merger and the vote to withdraw from the Denomination. These factual disputes need not be resolved to affirm the trial court’s entry of summary judgment in favor of Plaintiffs. Plaintiffs have shown that there is no evidence in the record to support

BURNS v. KINGDOM IMPACT GLOBAL MINISTRIES, INC.

[251 N.C. App. 724 (2017)]

Defendant's contention that Frances Jackson, acting alone, had sole authority to transfer the Property. The undisputed evidence demonstrates that the deed from Parks Chapel to Kingdom Impact was invalid because (1) the deeds conveying the Property to the trustees of Free Will Baptist Church, predecessor to Parks Chapel, included restrictive language requiring that the Property be used by a church affiliated with the Denomination; (2) Parks Chapel, successor to Free Will Baptist Church, continued the church's affiliation with the Denomination; and (3) Kingdom Impact is not affiliated with the Denomination. The undisputed evidence also demonstrates that France Jackson did not have sole authority to transfer the Property without the signatures of all trustees.

Because the purported transfer of real property to Kingdom Impact violated real property statutes, the trial court did not need to resolve any factual dispute regarding corporate governance to invalidate the transfer and enter summary judgment quieting title in the Property to Plaintiffs.

Conclusion

For the above reasons, we hold that the trial court did not err in ordering sanctions or in granting Plaintiffs' motion for summary judgment because there did not exist any genuine issues of material fact and Plaintiffs were entitled to judgment as a matter of law. Accordingly, we affirm the trial court's sanctions and order for summary judgment.

AFFIRMED.

Judges BRYANT and TYSON concur.

FAGUNDES v. AMMONS DEV. GRP., INC.

[251 N.C. App. 735 (2017)]

FRANCISCO FAGUNDES AND DESIREE FAGUNDES, PLAINTIFFS

v.

AMMONS DEVELOPMENT GROUP, INC.; EAST COAST DRILLING & BLASTING, INC.;
SCOTT CARLE; AND JUAN ALBINO, DEFENDANTS

No. COA16-776

Filed 7 February 2017

1. Appeal and Error—interlocutory orders and appeals—exclusivity provisions of Workers’ Compensation Act—substantial right

The denial of a motion concerning the exclusivity provision of the Workers’ Compensation Act affects a substantial right and thus is immediately appealable.

2. Workers’ Compensation—jurisdiction—exclusive remedy—strict liability claim against employer—Woodson claim—inherent danger—ultrahazardous occupation

The trial court lacked jurisdiction to adjudicate plaintiff employee’s strict-liability claims against defendant employer. Plaintiff employee was injured in a work-related accident, and the Workers’ Compensation Act provided the exclusive remedy for his injuries. The portion of *Woodson* addressing jurisdiction under the Workers’ Compensation Act did not depend on the inherent danger of the occupation.

3. Workers’ Compensation—liability of co-employee—supervisor—failure to show willful, wanton, or reckless actions

The trial court erred by denying defendant supervisor Albino’s motion for summary judgment on plaintiff employee’s claim under *Pleasant v. Johnson*, 312 N.C. 710. Plaintiff employee did not forecast any evidence showing that Albino’s actions while supervising the blast were willful, wanton, or reckless.

Appeal by defendants from order entered 8 March 2016 by Judge Michael J. O’Foghluudha in Wake County Superior Court. Heard in the Court of Appeals 30 November 2016.

The Jernigan Law Firm, by Leonard T. Jernigan, Jr. and Anthony L. Lucas, and Edwards Kirby, LLP, by William W. Plyler, for plaintiff-appellee.

Young Moore and Henderson, P.A., by Jay P. Tobin, for defendants-appellants.

FAGUNDES v. AMMONS DEV. GRP., INC.

[251 N.C. App. 735 (2017)]

DIETZ, Judge.

The central issue in this appeal is whether employees injured while working in “ultrahazardous” jobs may sue their employers in the court system despite the provisions of the Workers’ Compensation Act requiring those claims to be pursued at the Industrial Commission.

Plaintiff Francisco “Frank” Fagundes, who seeks to sue his employer for injuries suffered during a blasting accident, acknowledges that this is a novel argument. But he contends that his position is simply a logical extension of our Supreme Court’s decision in *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991).

We disagree. The portion of *Woodson* addressing jurisdiction under the Workers’ Compensation Act does not depend on the inherent danger of the occupation. *Woodson* permits injured workers to sue in court if their employer engaged in “misconduct knowing it is substantially certain to cause serious injury or death,” regardless of whether the job, ordinarily, is a dangerous one. 329 N.C. at 340, 407 S.E.2d at 228. Fagundes does not argue that he can satisfy the *Woodson* substantial certainty test. He instead argues that his job at a blasting company involved an “ultra-hazardous” activity which, at common law, was the subject of a strict liability cause of action in the court system. He argues that, because of the danger of his job and the common law remedies traditionally available to him, he should be permitted to sue in court.

Put another way, what Fagundes wants is not for this Court to extend the reasoning of *Woodson* to a closely analogous set of facts, but to rewrite the Workers’ Compensation Act to create an exception that he believes serves important policy purposes. That is not what courts do. When the General Assembly established the exclusive jurisdiction of the workers’ compensation system, it chose not to create the exception that Fagundes seeks from the courts. We have no authority to override that legislative decision.

Accordingly, as explained in more detail below, we reverse the trial court’s denial of Defendants’ motions for summary judgment and remand for entry of an appropriate order and judgment consistent with this opinion.

Facts and Procedural History

Defendant East Coast Drilling & Blasting, Inc. is a company that provides construction services, including drilling, blasting, and crushing rock. Defendant Scott Carle is the company’s president and CEO. Defendant Juan Albino is a blaster for the company.

FAGUNDES v. AMMONS DEV. GRP., INC.

[251 N.C. App. 735 (2017)]

On 25 July 2013, Plaintiff Frank Fagundes was performing rock crushing services for the company when debris ejected from a blasting operation that Albino was supervising struck and seriously injured Fagundes. On 29 January 2015, Fagundes sued the company, Carle, and Albino. Among other claims, Fagundes asserted a strict liability claim against all three defendants and a willful, wanton, or reckless negligence claim against Albino.

[1] Defendants moved for summary judgment on 17 December 2015. Among other grounds, Defendants argued that Fagundes failed to forecast sufficient evidence to overcome the exclusivity provision in the Workers' Compensation Act, which severely limits the types of workplace injury claims that can be pursued in the court system.¹ On 8 March 2016, the trial court entered an order partially granting the motion, but denying the motion with respect to Fagundes's strict liability claim and his willful, wanton, or reckless negligence claim against Albino. Defendants timely appealed. This Court has appellate jurisdiction because the denial of a motion concerning the exclusivity provision of the Workers' Compensation Act affects a substantial right and thus is immediately appealable. *Blue v. Mountaire Farms, Inc.*, __ N.C. App. __, __, 786 S.E.2d 393, 397–98 (2016).

Analysis**I. Strict liability claim for injury during an ultrahazardous activity**

[2] Defendants first argue that Fagundes's claims are barred because he was injured on the job. Thus, Defendants argue, the Industrial Commission has exclusive jurisdiction over his claims. Fagundes contends that, because he worked in an ultrahazardous occupation (involving blasting), he should be permitted to sue in the courts. Fagundes concedes that this is a novel argument but asserts that it is a logical extension of our Supreme Court's holding in *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991). As explained below, we agree with Defendants.

In general, the provisions of the Workers' Compensation Act "are the exclusive remedy in the event of [an] employee's injury by accident in connection with [his or her] employment." *Reece v. Forga*, 138 N.C. App. 703, 705, 531 S.E.2d 881, 882–83 (2000). Under the Act, "the injured employee may not elect to maintain a suit for recovery of damages for

1. Defendants first raised this argument in a 14 April 2015 motion to dismiss. But based on the appellate record, it appears the trial court never ruled on that motion.

FAGUNDES v. AMMONS DEV. GRP., INC.

[251 N.C. App. 735 (2017)]

his injuries, but must proceed under the Act.” *Id.* As a result, claims stemming from workplace injuries “are within the exclusive jurisdiction of the Industrial Commission; the superior court has been divested of jurisdiction by statute.” *Id.*

In *Woodson*, our Supreme Court created a narrow exception to the exclusivity provision of the Act. *See* 329 N.C. at 340–41, 407 S.E.2d at 228. Under *Woodson*, “if an employer ‘intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death’ and that conduct causes injury or death, a plaintiff can pursue a civil action against his or her employer.” *Trivette v. Yount*, 366 N.C. 303, 306, 735 S.E.2d 306, 309 (2012) (quoting *Woodson*, 329 N.C. App. at 340, 407 S.E.2d at 228). Importantly, nowhere in this analysis did the Supreme Court suggest that the dangerousness of the job itself impacted the *Woodson* test. *Woodson*, 329 N.C. at 337–44, 407 S.E.2d at 226–30.

Fagundes argues that this Court should extend *Woodson* to recognize “that an employer who engages in blasting . . . is not protected by the exclusivity provision” and may be held strictly liable for injuries in a court proceeding. This proposed holding does not follow from *Woodson*’s reasoning—indeed, it runs counter to *Woodson*’s core premise. To be sure, a separate portion of the *Woodson* opinion discussed how a general contractor could be held strictly liable for injuries caused by a subcontractor engaged in an ultrahazardous activity, such as blasting. *Id.* at 350–56, 407 S.E.2d at 234–38. But that analysis came in an entirely separate section of the opinion, well after the portion addressing the exclusivity provision of the Workers’ Compensation Act. In the portion of the opinion that addressed exclusive jurisdiction over workplace injuries, the Court focused on the employer’s knowledge and intent, not the dangerousness of the job itself. *Compare id.* at 337–44, 407 S.E.2d at 226–30, *with id.* at 350–56, 407 S.E.2d at 234–38. This is noteworthy because the job at issue in *Woodson*—trenching—also is extremely dangerous. If the Supreme Court believed the dangerousness of the job played a role in its analysis, it would have said so.

Fagundes also focuses on the fact that his job (involving blasting) is the only type of job that our State’s courts have found to be “ultrahazardous.” *See generally Kinsey v. Spann*, 139 N.C. App. 370, 374, 533 S.E.2d 487, 491 (2000). At common law, one who caused injury or property damage while engaged in an ultrahazardous activity like blasting was held strictly liable. Courts imposed strict liability because ultrahazardous activities were so dangerous that “reasonable care [could not] eliminate the risk of serious harm.” *Woodson*, 329 N.C. at 350, 407 S.E.2d at 234. Fagundes argues that, because this special common law rule

FAGUNDES v. AMMONS DEV. GRP., INC.

[251 N.C. App. 735 (2017)]

applied to workers injured on the job, he should be permitted to assert his strict liability claim in the court system.

The obvious flaw in this argument is that the workers' compensation system also imposes strict liability on employers. *See id.* at 338, 407 S.E.2d at 227. Thus, as Fagundes conceded at oral argument, the only difference between pursuing his claim in court and pursuing it in the Industrial Commission is the possibility of a larger monetary recovery in court. Put another way, Fagundes's argument has nothing to do with the exclusivity analysis our Supreme Court conducted in *Woodson*; rather, Fagundes believes this Court should create a new exception to the Workers' Compensation Act because of the high risk of serious injury in these types of ultrahazardous jobs and the robust common law remedies that were available to workers injured in these types of jobs before our General Assembly created the workers' compensation system.²

We must reject this argument. This Court is "an error-correcting body, not a policy-making or law-making one." *Times News Pub. Co. v. Alamance-Burlington Bd. of Educ.*, __ N.C. App. __, __, 774 S.E.2d 922, 927 (2015). We lack the authority to change the law on the ground that it might make good policy sense to do so. If Fagundes believes the Workers' Compensation Act should provide an exception for workers engaged in ultrahazardous activities, he must seek that policy change at the General Assembly.

In sum, because Fagundes was injured in a work-related accident, the Workers' Compensation Act provides the exclusive remedy for his injuries, and the trial court lacked jurisdiction to adjudicate his strict-liability claims against his employer. *See Bowden v. Young*, __ N.C. App. __, __, 768 S.E.2d 622, 624 (2015). We therefore reverse the trial court's denial of summary judgment on those claims and remand for entry of an order dismissing those claims for lack of jurisdiction.³

2. True enough, there were robust remedies at common law. But there were also robust defenses. Even in strict liability cases, for example, defendants could assert assumption of the risk as a defense. *See Pleasant v. Johnson*, 312 N.C. 710, 711, 325 S.E.2d 244, 246 (1985). The General Assembly enacted our workers' compensation system to eliminate much of the uncertainty in workplace accident cases by providing employees with limited but assured remedies. *Id.* at 711–12, 325 S.E.2d at 246–47.

3. Fagundes also argues that this Court is bound by our decision in *Hargrove v. Billings & Garrett, Inc.*, 137 N.C. App. 759, 529 S.E.2d 693 (2000). That case involved suit by an injured worker against the city that contracted with his employer and whether the city was immune from suit under the public duty doctrine. *Hargrove*, 137 N.C. App. at 761, 529 S.E.2d at 695. The injured worker's employer was not a party to the appeal, and the Court did not address the exclusivity provision of the Workers' Compensation Act.

FAGUNDES v. AMMONS DEV. GRP., INC.

[251 N.C. App. 735 (2017)]

II. *Pleasant* claim against Fagundes's co-employee

[3] Defendant Juan Albino also challenges the trial court's denial of his motion for summary judgment on Fagundes's claim against him under *Pleasant v. Johnson*, 312 N.C. 710, 716, 325 S.E.2d 244, 249 (1985). Because Fagundes did not forecast any evidence showing that Albino's actions while supervising the blast were willful, wanton, or reckless, we agree that the trial court should have entered summary judgment in Albino's favor on this claim.

"[A] defendant, as the moving party, may meet its burden on summary judgment by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim." *Camalier v. Jeffries*, 340 N.C. 699, 710–11, 460 S.E.2d 133, 138 (1995).

In *Pleasant*, our Supreme Court held that the Workers' Compensation Act "does not shield a co-employee from common law liability for willful, wanton and reckless negligence." 312 N.C. at 716, 325 S.E.2d at 249. The Court described "wanton" and "reckless" conduct as "manifesting a *reckless disregard* for the rights and safety of others" and defined "willful negligence" as "the *intentional* failure to carry out some duty imposed by law or contract which is necessary to the safety of the person or property to which it is owed." *Id.* at 714, 325 S.E.2d at 248 (emphasis added). "[T]he burden of proof is heavy on a plaintiff who seeks to recover under *Pleasant*." *Trivette*, 366 N.C. at 310, 735 S.E.2d at 311. "[E]ven unquestionably negligent behavior rarely meets the high standard of 'willful, wanton and reckless' negligence established in *Pleasant*." *Id.* at 312, 735 S.E.2d at 312.

The only evidence on which Fagundes relies to support his *Pleasant* claim is five citations for OSHA safety violations stemming from the accident that injured him. He offers proof that Albino was responsible for these five safety violations. But Fagundes concedes that, before his accident, neither Albino nor the company had ever been cited for any OSHA violations, nor had anyone been injured as a result of the company's blasting activities. His argument turns entirely on the fact that the State Department of Labor characterized the safety violations as "egregious."

We hold that these safety violations, while troubling, are insufficient to survive a motion for summary judgment under *Pleasant*. In *Pendergrass v. Card Care, Inc.*, our Supreme Court rejected a *Pleasant* claim against two co-employees who ordered the injured worker "to

FAGUNDES v. AMMONS DEV. GRP., INC.

[251 N.C. App. 735 (2017)]

work at the final inspection machine when they knew that certain dangerous parts of the machine were unguarded, in violation of OSHA regulations and industry standards.” 333 N.C. 233, 238, 424 S.E.2d 391, 394 (1993). The Supreme Court held that the knowing violation of these safety regulations did “not rise to the level of the negligence in *Pleasant*.” *Id.* The Court elaborated as follows:

Although [the co-employees] may have known certain dangerous parts of the machine were unguarded when they instructed [the injured employee] to work at the machine, we do not believe this supports an inference that they intended that [the employee] be injured or that they were manifestly indifferent to the consequences of his doing so.

Id.

We are unable to distinguish this case from *Pendergrass*. Indeed, the facts in this case arguably are weaker than the facts in *Pendergrass* because Fagundes has not forecast any evidence that Albino *knowingly* violated these safety regulations. In short, after an opportunity to fully engage in discovery, Fagundes remains unable to forecast any evidence for trial that would prove Albino was willfully, wantonly, or recklessly negligent. Accordingly, the trial court should have entered summary judgment in favor of Albino on this claim.

Conclusion

The trial court erred in denying Defendants’ motion for summary judgment. We reverse the trial court’s order and remand for entry of an order and judgment consistent with this opinion.

REVERSED AND REMANDED.

Judges CALABRIA and ZACHARY concur.

HOLMES v. ASSOCIATED PIPE LINE CONTRACTORS, INC.

[251 N.C. App. 742 (2017)]

MARTHA HOLMES, EMPLOYEE, PLAINTIFF

v.

ASSOCIATED PIPE LINE CONTRACTORS, INC., EMPLOYER, OLD REPUBLIC
CONSTRUCTION PROGRAM GROUP, INC., CARRIER (GALLAGHER BASSETT
SERVICES, THIRD-PARTY ADMINISTRATOR), DEFENDANTS

No. COA16-593

Filed 7 February 2017

**Workers' Compensation—lack of jurisdiction—mandatory drug
test in another state before work—last act to form employ-
ment contract**

The Industrial Commission did not err in a workers' compensation case by denying plaintiff employee's claim based on lack of jurisdiction. The employee's submission to a mandatory drug test in another state before beginning work constituted the last act necessary to form an employment contract between the employee and her employer.

Appeal by plaintiff from opinion and award entered 2 March 2016 by the North Carolina Industrial Commission. Heard in the Court of Appeals 2 November 2016.

Oxner + Permar, PLLC, by John R. Landry, Jr., for plaintiff-appellant.

Hedrick Gardner Kincheloe & Garofalo, LLP, by M. Duane Jones and Thomas W. Page, for defendants-appellees.

DAVIS, Judge.

This workers' compensation case presents the jurisdictional question of whether an employee's submission to a mandatory drug test in another state before beginning work constitutes the last act necessary to form an employment contract between the employee and her employer. Martha Holmes ("Plaintiff") appeals from an opinion and award of the North Carolina Industrial Commission dismissing her claims for benefits under the North Carolina Workers' Compensation Act based on lack of jurisdiction. Because we conclude that the last act necessary to create her employment contract occurred in Texas, we affirm.

HOLMES v. ASSOCIATED PIPE LINE CONTRACTORS, INC.

[251 N.C. App. 742 (2017)]

Factual and Procedural Background

Associated Pipe Line Contractors, Inc. (“Associated”) is headquartered and has its principal place of business in Houston, Texas. In the fall of 2013, Associated was in need of workers for a project in Huntsville, Texas. Associated’s superintendent contacted the on-site union steward at the work site in Huntsville and informed the steward that Associated needed union workers for the project. The steward then contacted “Local 798,” a local trade union based in Tulsa, Oklahoma.

Since 2007, Plaintiff, a member of Local 798, had been working as a welder helper for various contractors. On 29 October 2013 — while Plaintiff was living in Fayetteville, North Carolina — she was contacted by telephone by a representative of Local 798 and told to report to an assignment in Huntsville, Texas. Plaintiff was instructed that “she had 24 hours to be in route to the jobsite” and that Associated would reimburse her for her travel expenses.

When she arrived in Huntsville, Plaintiff was required to submit to a drug test and complete various forms — including an authorization for a Department of Transportation background check — before she could begin working. Within two hours after taking the drug test, Plaintiff began work at the Huntsville jobsite.

On 8 and 26 January 2014, Plaintiff suffered injuries on the jobsite. On 24 March 2014, Plaintiff filed a Form 18 Notice of Accident for the first injury, and on 5 September 2014, she submitted a Form 18 for the second injury. Associated filed a Form 61 denying liability on 12 May 2014 and an amended Form 61 on 21 August 2014. Its denial of liability was based on the assertion that “the North Carolina Industrial Commission does not have jurisdiction over this claim, which occurred outside of North Carolina.”

On 13 May 2014, Plaintiff filed a Form 33 Request that Claim be Assigned for Hearing. On 25 June 2014, Associated filed a Form 33R disputing that Plaintiff had sustained a compensable injury and once again contending that the Industrial Commission lacked jurisdiction over her claims. Plaintiff subsequently filed an amended Form 33 to include her second injury.

On 9 December 2014, a hearing was held before Deputy Commissioner George T. Glenn, II. Plaintiff, Ryan Wilcox, Associated’s Vice President of Safety and Compliance, and Gary Allison, the welding foreman for the project, appeared as witnesses at the hearing. Wilcox testified that when Associated is in need of laborers for a project, it requests the workers

HOLMES v. ASSOCIATED PIPE LINE CONTRACTORS, INC.

[251 N.C. App. 742 (2017)]

through an on-site union steward. The steward then contacts a trade union, who, in turn, dispatches workers from various locations around the country. When the workers arrive at the jobsite, they are required to take a drug test and consent to a background check. Unless the worker submits to both the drug test and the background check, she will not be hired. Because it takes several days for Associated to receive the results, the worker begins work immediately upon taking the drug test and signing a form acknowledging consent to the background check.

On 25 February 2015, the Deputy Commissioner issued an opinion and award dismissing Plaintiff's claims based on lack of subject matter jurisdiction. Plaintiff appealed to the Full Commission on 2 March 2015. On 1 October 2015, the Full Commission heard arguments from the parties as to whether the Commission possessed jurisdiction over Plaintiff's claims.

On 2 March 2016, the Commission issued its Opinion and Award, which contained the following pertinent findings of fact:

6. Plaintiff was working for [Associated] on a job site located in Huntsville, Texas at the time of her alleged injuries. This was the only location at which plaintiff ever worked for [Associated].
7. While performing a contract job in Huntsville, Texas, [Associated] contacted the on-site union steward and requested union workers for the job. The union steward contacted the Local 798 union in Tulsa, Oklahoma. A dispatcher with the Local 798 union in Oklahoma then contacted plaintiff at her home in Fayetteville, North Carolina.
8. The Local 798 dispatcher told plaintiff to report to an assignment in Huntsville, Texas as a welder's helper. The union dispatcher informed plaintiff that she had 24 hours to be *en route* to the job site in Huntsville, Texas, and she was required to travel 500 miles per day.
9. [Associated] did not specifically request plaintiff for the job in Huntsville, Texas when requesting workers through the Local 798 union, nor did [Associated] directly contact plaintiff in North Carolina for the Huntsville, Texas job.
10. Neither plaintiff nor [Associated] could negotiate plaintiff's rate of pay or her work schedule for her work on the Huntsville, Texas job. Plaintiff's rate of pay was pre-determined by an agreement between [Associated] and the Pipe Line Contractors Association. Further, plaintiff's

HOLMES v. ASSOCIATED PIPE LINE CONTRACTORS, INC.

[251 N.C. App. 742 (2017)]

working hours on the Huntsville, Texas job were pre-determined by an agreement between [Associated], the union, and Texas state requirements.

11. Ryan Michael Wilcox testified as Vice President of Safety and Compliance for [Associated]. In this position, Mr. Wilcox assists union workers with completing necessary paperwork required as part of [Associated]'s hiring process. This hiring process includes obtaining consent from union workers to perform a background check. Mr. Wilcox was not involved in contacting the Local 798 union to request workers.

12. Mr. Wilcox testified that if any union member does not provide a urine sample for purposes of a drug screen or consent to a background check, then those union members are not employable and [Associated] does not pay the union member any compensation for travel to the job site or otherwise. Once the union member provides the urine sample and consents to the background check, that individual reports to the safety office for safety training, environmental training, and other orientation presentations. Once the union member has successfully completed the orientation process, that individual is allowed to begin work at the job site and continue work until results of the drug test and background check are returned.

13. Plaintiff completed the necessary paperwork, consented to the background check, and provided a urine sample for the drug test on October 29, 2013. Upon completion of these pre-employment processes, [Associated] hired plaintiff and she began work at the Huntsville, Texas job site.

14. Mr. Wilcox testified that if plaintiff's drug test or background check had not "come back clean," she would have been terminated from the Huntsville, Texas job and paid a per-day rate for the time she worked versus the full hourly rate required by the union agreement.

15. Plaintiff contends that she was automatically hired by [Associated] once she received the call from the Local 798 union dispatcher to present to the Huntsville, Texas job. However, plaintiff testified that she did not begin work on

HOLMES v. ASSOCIATED PIPE LINE CONTRACTORS, INC.

[251 N.C. App. 742 (2017)]

the Huntsville, Texas job until after she consented to the drug screen required by [Associated].

....

18. The preponderance of the evidence in view of the entire record establishes that plaintiff's submission to a drug test and background check and completion of certain paperwork were conditions precedent to her hire by [Associated] for the Huntsville, Texas job.

19. The preponderance of the evidence in view of the entire record establishes that plaintiff submitted to the drug test, consented to the background check, and completed all necessary paperwork upon her arrival in Huntsville, Texas. It was only upon the completion of these processes that [Associated] hired plaintiff and she began work on the Texas job. Accordingly, the Commission finds that the last act required to create a contract of employment between plaintiff and [Associated] occurred in Texas.

Based on these findings of fact, the Commission made the following pertinent conclusions of law:

3. "To determine where a contract for employment was made, the Commission and the courts of this state apply the 'last act' test." *Murray v. Ahlstrom Indus. Holdings, Inc.*, 131 N.C. App. 294, 296, 506 S.E.2d 724, 726 (1998) (internal citations omitted).

4. "[F]or a contract to be made in North Carolina, the final act necessary to make it a binding obligation must be done here." *Thomas v. Overland Express, Inc.*, 101 N.C. App. 90, 96, 398 S.E.2d 921, 926 (1990) (internal citations omitted). The completion of paperwork generally constitutes an administrative task that serves as a consummation of the employment relationship and is not the "last act" for purposes of making the relationship a binding obligation. *Murray*, 131 N.C. App. at 296-97, 506 S.E.2d at 726-27 (citing *Warren v. Dixon and Christopher Co.*, 252 N.C. 534, 114 S.E.2d 250 (1960)). However, the completion of such things as an orientation program, a physical examination, a road test, or a drug test as part of the hiring process extends "well beyond 'mostly administrative' paperwork." *Taylor v. Howard Transp., Inc.*, ___

HOLMES v. ASSOCIATED PIPE LINE CONTRACTORS, INC.

[251 N.C. App. 742 (2017)]

N.C. App. ___, ___, 771 S.E.2d 835, 839 (2015), *disc. rev. denied*, ___ N.C. ___ (2015).

5. Based upon a preponderance of the evidence in view of the entire record, the Commission concludes that plaintiff's submission to the drug test and consent to a background check outside of North Carolina, upon her arrival in Huntsville, Texas, were conditions precedent to her hire by [Associated] and such contingences [sic] were more than administrative paperwork. Had plaintiff not submitted to the drug test and consented to the background check, [Associated] would not have hired plaintiff to work on the Huntsville, Texas job. Consequently, the Commission concludes the "last act" necessary to create an employment contract and a binding obligation between plaintiff and [Associated] occurred in Texas. N.C. Gen. Stat. § 97-36; *Taylor*, 771 S.E.2d at 839; *Thomas*, 101 N.C. App. at 96, 398 S.E.2d at 926; *Murray*, 131 N.C. App. at 296, 506 S.E.2d at 726.

6. Because the contract of employment between plaintiff and [Associated] was not made in North Carolina; [Associated]'s principal place of business is not in North Carolina; and plaintiff's principal place of employment was not in North Carolina, the North Carolina Industrial Commission cannot assert subject matter jurisdiction over these claims. N.C. Gen. Stat. § 97-36.

Based on these conclusions, the Commission dismissed Plaintiff's claims. Deputy Commissioner Bernadine S. Ballance dissented based on her belief that the Commission possessed jurisdiction in light of the fact that Plaintiff's contract of employment was, in fact, made in North Carolina. On 23 March 2016, Plaintiff filed a timely notice of appeal.

Analysis

Appellate review of an opinion and award of the Industrial Commission is typically "limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law." *Philbeck v. Univ. of Mich.*, 235 N.C. App. 124, 127, 761 S.E.2d 668, 671 (2014) (citation and quotation marks omitted). "The findings of fact made by the Commission are conclusive on appeal if supported by competent evidence even if there is also evidence that would support a contrary finding. The Commission's conclusions of law, however, are reviewed

HOLMES v. ASSOCIATED PIPE LINE CONTRACTORS, INC.

[251 N.C. App. 742 (2017)]

de novo.” *Morgan v. Morgan Motor Co. of Albemarle*, 231 N.C. App. 377, 380, 752 S.E.2d 677, 680 (2013) (internal citation omitted), *aff’d per curiam*, 368 N.C. 69, 772 S.E.2d 238 (2015). However,

[w]hen reviewing an Opinion and Award, the jurisdictional facts found by the Commission are not conclusive even if there is evidence in the record to support such findings. Instead, reviewing courts are obliged to make independent findings of jurisdictional facts based upon consideration of the entire record.

Salvie v. Med. Ctr. Pharm. of Concord, Inc., 235 N.C. App. 489, 491, 762 S.E.2d 273, 276 (2014) (internal citations and quotation marks omitted).

The North Carolina Workers’ Compensation Act provides, in pertinent part, as follows:

Where an accident happens while the employee is employed elsewhere than in this State and the accident is one which would entitle him or his dependents or next of kin to compensation if it had happened in this State, then the employee or his dependents or next of kin shall be entitled to compensation (i) *if the contract of employment was made in this State*, (ii) if the employer’s principal place of business is in this State, or (iii) if the employee’s principal place of employment is within this State; provided, however, that if an employee or his dependents or next of kin shall receive compensation or damages under the laws of any other state nothing herein contained shall be construed so as to permit a total compensation for the same injury greater than is provided for in this Article.

N.C. Gen. Stat. § 97-36 (2015) (emphasis added).

Here, it is undisputed that Associated’s principal place of business is in Texas, and Plaintiff does not contend that her principal place of employment is within North Carolina. Thus, the only remaining question is whether Plaintiff’s contract of employment was made in Texas or North Carolina.

In determining where a contract of employment was made, our courts apply the “last act” test. *Murray v. Ahlstrom Indus. Holdings, Inc.*, 131 N.C. App. 294, 296, 506 S.E.2d 724, 726 (1998). “For a contract to be made in North Carolina, the final act necessary to make it a binding obligation must be done here.” *Id.* (citation, quotation marks, and brackets omitted). In the present case, Plaintiff contends that the

HOLMES v. ASSOCIATED PIPE LINE CONTRACTORS, INC.

[251 N.C. App. 742 (2017)]

last act necessary to form her employment contract occurred in North Carolina because she accepted the job for Associated by telephone from her North Carolina home. Associated, conversely, argues that her employment was conditioned upon her submission to a drug test and written consent to a background check — acts that did not occur until she arrived in Texas.

Plaintiff relies primarily on our decision in *Murray*. In that case, the defendant-employer's agent contacted the plaintiff-employee in North Carolina for a position as an instrument and pipe foreman at a jobsite in Mississippi. The plaintiff, who had previously performed work for the employer, negotiated his salary over the telephone in North Carolina with the agent. When the plaintiff arrived at the jobsite in Mississippi, he was required to fill out paperwork before he could begin work. However, "because he was a rehire (as opposed to a new hire) he was not required to submit to a physical, drug test, or go to the local employment security office." *Murray*, 131 N.C. App. at 295, 506 S.E.2d at 725.

Shortly thereafter, the plaintiff was injured on the job. He filed a workers' compensation claim with the North Carolina Industrial Commission, and the Commission determined it possessed jurisdiction over the claim. *Id.* at 295, 506 S.E.2d at 726.

On appeal, this Court affirmed, holding that "[t]he paperwork appears to be more of a consummation of the employment relationship than the 'last act' required to make it a binding obligation." *Id.* at 297, 506 S.E.2d at 727. In reaching this conclusion, we noted that "[a]lthough the paperwork filled out by plaintiff was required before he could begin work," the employer had conceded that the paperwork was "mostly administrative." *Id.* Thus, we held that "[t]he Commission's findings were based upon ample competent evidence, and the conclusion that the contract was made in North Carolina was correct." *Id.*

In *Murray*, we cited our prior opinion in *Thomas v. Overland Express, Inc.*, 101 N.C. App. 90, 398 S.E.2d 921 (1990), *disc. review denied*, 328 N.C. 576, 403 S.E.2d 522 (1991). In *Thomas*, an employer arranged for the plaintiff — who lived in North Carolina — to fly to Indiana along with other prospective employees before officially hiring them as truck drivers. Upon arriving in Indiana, "the plaintiff was given a physical and road test by [the employer]." *Id.* at 94, 398 S.E.2d at 924. Four days after his arrival in Indiana, he was informed that he was being hired as a truck driver by the employer and signed employment-related paperwork that same day. The plaintiff subsequently sustained an injury arising out of his employment. *Id.* at 93, 398 S.E.2d at 924.

HOLMES v. ASSOCIATED PIPE LINE CONTRACTORS, INC.

[251 N.C. App. 742 (2017)]

The plaintiff filed a workers' compensation claim in North Carolina, which the Industrial Commission dismissed for lack of jurisdiction. *Id.* We affirmed, explaining that "our review of the record in the present case reveals that the events which culminated in plaintiff accepting employment with defendant, and the 'last act' for purposes of conferring extraterritorial jurisdiction on the Commission, occurred in Indiana rather than in North Carolina." *Id.* at 97, 398 S.E.2d at 926.

Associated contends that the present case is most analogous to *Taylor v. Howard Transp., Inc.*, __ N.C. App. __, 771 S.E.2d 835, *disc. review denied*, __ N.C. __, 775 S.E.2d 857 (2015). In *Taylor*, an employer sent the plaintiff a letter "inviting him to reapply to work for [the employer]." *Id.* at __, 771 S.E.2d at 837-38. The plaintiff responded that he would only do so if the employer provided a better truck for him and assigned him to a different dispatcher. The employer told the plaintiff that his conditions would be met if he would "come back to work." *Id.* at __, 771 S.E.2d at 838 (quotation marks omitted). The plaintiff agreed, and the employer arranged for a van to pick the plaintiff up from his home in North Carolina and take him to the employer's headquarters in Mississippi. *Id.* at __, 771 S.E.2d at 838.

After the plaintiff successfully completed in Mississippi the employer's "orientation, a road test, a drug test, and a physical exam[.]" the employer hired the plaintiff as a truck driver. *Id.* at __, 771 S.E.2d at 836. The plaintiff was subsequently injured in Maryland in the course of his employment. The plaintiff brought a workers' compensation claim in North Carolina, and the Industrial Commission determined that it lacked jurisdiction over the plaintiff's claim. *Id.* at __, 771 S.E.2d at 836.

Concluding that "this case is more closely analogous to *Thomas* than to *Murray*["] *id.* at __, 771 S.E.2d at 839, we affirmed the Commission's decision. We reasoned that the employer "did not consider plaintiff an employee until after he had successfully completed the orientation, road test, drug test, and physical exam." *Id.* at __, 771 S.E.2d at 839. Thus, we held that the "plaintiff would not have been hired as an employee if he had failed one of these tests[.]" *Id.* at __, 771 S.E.2d at 838. Moreover, we stated that "[t]he fact that plaintiff was paid for [the three-day orientation period] does not vitiate the fact that plaintiff's employment was contingent upon his successful completion of the orientation, road test, drug test, and physical exam." *Id.* at __, 771 S.E.2d at 839. Therefore, we concluded that the last act forming the plaintiff's employment contract occurred in Mississippi. *Id.* at __, 771 S.E.2d at 839.

HOLMES v. ASSOCIATED PIPE LINE CONTRACTORS, INC.

[251 N.C. App. 742 (2017)]

We believe that the present facts are more similar to *Taylor* and *Thomas* than *Murray*. The evidence is undisputed that Associated made Plaintiff's submission to a drug test a prerequisite to her employment. It is clear that she would not have been permitted to begin work for Associated had she refused to provide a urine sample. We are unable to agree with Plaintiff that a prospective employee's submission to a mandatory drug test is akin to the completion of routine paperwork that was determined to be merely a "consummation of the employment relationship" in *Murray*. See *Murray*, 131 N.C. App. at 297, 506 S.E.2d at 727. Rather, a prospective employee's demonstrated willingness to submit to a drug test is more than simply an administrative formality given that — unlike the completion of garden-variety personnel forms — the taking of a drug test carries the risk of failing the test. Moreover, while Plaintiff argues that requiring a drug test as a condition of employment makes sense only if the employee is not permitted to begin work until the *results* of the test are received by the employer, the employer possesses the discretion to determine how soon a new employee may begin working after taking the drug test.

Quite simply, had Plaintiff refused to submit to a drug test upon her arrival in Texas, she would not have been permitted to begin employment with Associated. Therefore, her taking of the drug test was the last act necessary to form a binding employment relationship between her and Associated. Because this act occurred in Texas rather than North Carolina, the Commission lacked jurisdiction over her claims pursuant to N.C. Gen. Stat. § 97-36.¹

Plaintiff also cites *Warren v. Dixon & Christopher Co.*, 252 N.C. 534, 114 S.E.2d 250 (1960), to support her argument that because Local 798 was an agent of Associated, the 29 October 2013 telephone conversation between the Local 798 representative and Plaintiff formed a binding employment contract between Plaintiff and Associated. In *Warren*, the plaintiff contracted with a local union in North Carolina to work as a pipe fitter for the employer. After arriving at the jobsite in Virginia, the plaintiff began work, was subsequently injured, and filed a workers' compensation claim in North Carolina. *Id.* at 536-37, 114 S.E.2d at 251-52.

1. In light of our holding that Plaintiff's submission to a drug test was a condition of her employment, we need not determine whether her consent to a background check likewise constituted a separate act necessary to form an employment contract between Plaintiff and Associated.

IN RE D.E.P.

[251 N.C. App. 752 (2017)]

Our Supreme Court affirmed the Commission's determination that it possessed jurisdiction over the plaintiff's claim. The Supreme Court held that even though "[t]he employer had a right to reject [the plaintiff] if work was not available . . . [a]ccepting the worker on the job was merely the consummation of what had been previously arranged, that is, the employment." *Id.* at 537-38, 114 S.E.2d at 252-53.

Here, while it appears from the record that Local 798 was authorized to select prospective employees for Associated, it is undisputed that Associated ultimately retained the right to deny employment to any such person who refused to submit to a drug test upon arrival in Texas. Therefore, the role played by Local 798 in Plaintiff's hiring process does not alter our conclusion that because her employment was contingent upon her submission to a drug test in Texas before she could begin work for Associated, the last act necessary to form a binding employment relationship occurred in Texas. Accordingly, the Commission correctly determined that it lacked jurisdiction over Plaintiff's workers' compensation claims.

Conclusion

For the reasons stated above, we affirm.

AFFIRMED.

Chief Judge MCGEE and Judge INMAN concur.

IN THE MATTER OF D.E.P.

No. COA16-838

Filed 7 February 2017

1. Juveniles—dispositional order—sufficiency of findings of fact

The trial court did not err by allegedly failing to include appropriate findings of fact in a juvenile dispositional order. The trial court was not required by N.C.G.S. § 7B-2512 to make findings of fact that expressly tracked each of the statutory factors listed in N.C.G.S. § 7B-2501(c). Even so, the order did in fact demonstrate the court's consideration of the statutory factors.

IN RE D.E.P.

[251 N.C. App. 752 (2017)]

2. Juveniles—dispositional order—Level 3—training school

The trial court did not abuse its discretion by imposing a Level 3 disposition that committed a juvenile to a training school for a minimum of six months and a maximum not to exceed his eighteenth birthday. The juvenile continued to violate his probation even after being given another chance to continue on a Level 2 disposition. Difficult family circumstances and the fact that the juvenile successfully completed some of the requirements of probation did not support a conclusion that the trial court's decision was unreasonable.

Appeal by juvenile from order entered 25 April 2016 by Judge David H. Strickland in Mecklenburg County District Court. Heard in the Court of Appeals 11 January 2017.

Blass Law, PLLC, by Danielle Blass, for juvenile-appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jennie Wilhelm Hauser, for the State.

ZACHARY, Judge.

The juvenile-appellant, Daniel,¹ appeals from a disposition order that committed him to the Department of Juvenile Justice for placement in a training school for a minimum of six months and a maximum not to exceed his eighteenth birthday. On appeal Daniel argues that the trial court erred in its disposition order by failing to enter findings that reflected its consideration of the factors set out in N.C. Gen. Stat. § 7B-2501(c), and abused its discretion by entering a Level 3 disposition committing him to training school. For the reasons that follow, we disagree.

I. Factual and Procedural Background

Daniel was born in 1999 and grew up in Charlotte, North Carolina. On 22 December 2014, the Mecklenburg County Department of Juvenile Justice filed petitions alleging that Daniel was a delinquent juvenile in that he had committed the misdemeanor offenses of communicating a threat, second-degree trespass, simple assault, and assault on a government official. On 20 February 2015, a petition was filed alleging that Daniel was guilty of simple possession of less than a half ounce of

1. We refer to the juvenile by the pseudonym Daniel in this opinion for ease of reading and to protect the juvenile's privacy.

IN RE D.E.P.

[251 N.C. App. 752 (2017)]

marijuana. On 6 March and 31 March 2015, petitions were filed alleging that Daniel had committed the offense of robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon. Daniel's father and older brother were identified in the petition as Daniel's co-conspirators.

In connection with the juvenile petitions, a juvenile court counselor filed a report for the trial court's use. This report described Daniel's attitude towards authority figures as "very rude and disrespectful" and stated that Daniel's mother was unable to effectively discipline Daniel. At school, Daniel had a "history of suspensions for aggressive behaviors, being disruptive, insubordinate, and fighting" and had admitted to skipping school on occasion. Daniel had been diagnosed with Type 2 diabetes for which he took insulin, as well as ADHD (attention deficit hyperactivity disorder) and ODD (oppositional defiant disorder), for which he was prescribed a psychoactive medication.

On 15 July 2015, a hearing was conducted on the juvenile petitions filed in this case. Daniel admitted that he had committed the offense of robbery with a dangerous weapon, and the State dismissed the other petitions. On 23 July 2015, the trial court entered an order that adjudicated Daniel to be a delinquent juvenile and imposed a Level 2 disposition, pursuant to N.C. Gen. Stat. § 7B-2508 (2015). Daniel was placed on juvenile probation for a period of 12 months and was required to comply with a 6:00 p.m. curfew, attend school regularly, and not violate any laws or possess any controlled substances.

On 1 September 2015, juvenile petitions were filed alleging that on 27 July 2015, just four days after being placed on probation, Daniel committed the offenses of resisting, delaying, or obstructing a law enforcement officer (when he jumped from a stolen vehicle), and possession of less than a half ounce of marijuana. Daniel's court counselor filed a motion for review alleging that Daniel had violated the terms of his juvenile probation by committing the offenses alleged in the petitions, by failing to adhere to the court-imposed curfew, and by being suspended from school for ten days. At a hearing conducted on 21 October 2015, Daniel admitted to possession of marijuana and the State dismissed the petition alleging that Daniel had resisted an officer. The trial court entered an order that continued Daniel on juvenile probation. On 8 January 2016, Daniel's court counselor filed a motion for review, alleging that Daniel had violated probation by failing to abide by his curfew and by being suspended from school for ten days. Another motion for review was filed on 2 February 2016, alleging that Daniel had violated his

IN RE D.E.P.

[251 N.C. App. 752 (2017)]

probation by leaving the home of his grandmother, with whom he had been directed to reside.

On 1 March 2016, the trial court conducted a hearing on the motions for review, at which Daniel admitted to violating the terms of his probation. The trial court continued the disposition until 11 April 2016, and entered an order that stated in relevant part that “[i]f [Daniel] does what he needs to do then he will remain at a Level 2 disposition[;] if not he will be committed to training school.” On 30 March 2016, a motion for review was filed, alleging that Daniel had violated probation by skipping school and being suspended from school. Following a dispositional hearing, the trial court entered an order on 25 April 2016, imposing a Level 3 disposition and committing Daniel to training school for a period of at least six months until no later than his 18th birthday. Daniel has appealed to this Court from this order.

II. Standard of Review

On appeal, Daniel does not dispute the validity of his adjudication as a delinquent juvenile or dispute the fact that he violated the terms of his probation. Nor does Daniel challenge the trial court’s statutory authority pursuant to N.C. Gen. Stat. § 7B-2510(e) (2015) to impose a Level 3 disposition committing him to training school upon Daniel’s admission to violating his probation. Daniel argues instead that the trial court failed to comply with the statutory requirements for entry of a dispositional order and that the trial court’s choice of disposition constituted an abuse of the court’s discretion. Accordingly, we first review the standards to which a trial court must adhere in fashioning an appropriate disposition for a delinquent juvenile.

N.C. Gen. Stat. § 7B-2500 (2015) provides that:

The purpose of dispositions in juvenile actions is to design an appropriate plan to meet the needs of the juvenile and to achieve the objectives of the State in exercising jurisdiction, including the protection of the public. The court should develop a disposition in each case that:

- (1) Promotes public safety;
- (2) Emphasizes accountability and responsibility of both the parent, guardian, or custodian and the juvenile for the juvenile’s conduct; and
- (3) Provides the appropriate consequences, treatment, training, and rehabilitation to assist the juvenile toward

IN RE D.E.P.

[251 N.C. App. 752 (2017)]

becoming a nonoffending, responsible, and productive member of the community.

The three levels of disposition for a delinquent juvenile are set out in N.C. Gen. Stat. § 7B-2508, which correlates the permissible disposition level to the offense for which the juvenile is being adjudicated delinquent and his prior history of juvenile adjudications. Daniel was initially given a Level 2-Intermediate disposition. Upon his repeated violation of the terms of probation, the trial court was authorized under N.C. Gen. Stat. § 7B-2510(e) to “order a new disposition at the next higher level on the disposition chart[,]” in this case a disposition under Level 3-Commitment. Daniel does not dispute that the disposition in the present case represented a legally valid choice under the relevant statutes.

The standard of review in such cases is well established: “In instances involving permissive statutory language, such as the language contained in N.C. Gen. Stat. § 7B-2510(e), the validity of the trial court’s actual dispositional decision is reviewed on appeal using an abuse of discretion standard of review.” *In re Z.T.W.*, 238 N.C. App. 365, 370, 767 S.E.2d 660, 664-65 (2014) (citation omitted). “[A]n abuse of discretion is established only upon a showing that a court’s actions are manifestly unsupported by reason, or so arbitrary that [they] could not have been the result of a reasoned decision.” *In re E.S.*, 191 N.C. App. 568, 573, 663 S.E.2d 475, 478 (2008) (internal quotation marks and citation omitted). “[A] trial court’s dispositional decision should be upheld on appeal unless the decision in question could not have been a reasoned one.” *Z.T.W.*, 238 N.C. App. at 370, 767 S.E.2d at 665.

III. Sufficiency of Findings of Fact in the Dispositional Order

[1] Daniel argues first that the trial court erred by failing to include appropriate findings of fact in the dispositional order. N.C. Gen. Stat. § 7B-2501(c) (2015) provides that, in “choosing among statutorily permissible dispositions,” the trial court “shall select a disposition that is designed to protect the public and to meet the needs and best interests of the juvenile” and that the trial court’s selection should be based upon:

- (1) The seriousness of the offense;
- (2) The need to hold the juvenile accountable;
- (3) The importance of protecting the public safety;
- (4) The degree of culpability indicated by the circumstances of the particular case; and

IN RE D.E.P.

[251 N.C. App. 752 (2017)]

- (5) The rehabilitative and treatment needs of the juvenile as indicated by a risk and needs assessment.

N.C. Gen. Stat. § 7B-2512 (2015) provides in relevant part that the “dispositional order shall be in writing and shall contain appropriate findings of fact and conclusions of law.” On appeal, Daniel asserts that in order for a trial court’s findings in a disposition order to constitute the “appropriate” findings of fact required by N.C. Gen. Stat. § 7B-2512, these findings must reference the specific factors listed in N.C. Gen. Stat. § 7B-2501(c) and must document the trial court’s consideration of each of these factors. On the other hand, the State argues on appeal that “neither statute requires the trial court to make written findings of fact for each of the five considerations under [N.C. Gen. Stat. §] 7B-2501(c).” After careful review, we agree with the State.

The position taken by Daniel on appeal is based upon the discussion in some of our prior cases concerning the holding of *In re Ferrell*, 162 N.C. App. 175, 589 S.E.2d 894 (2004). However, upon thorough examination, it is apparent that the standard posited rests upon the mischaracterization of *Ferrell* and subsequent repetition of this error.

As discussed above, N.C. Gen. Stat. § 7B-2501(c) directs the court to consider specific factors in its determination of the appropriate level or type of disposition in a juvenile delinquency case. In *Ferrell*, the juvenile appealed from a specific provision of the disposition order that removed him from the custody of his mother and placed him in the custody of his father. Although the juvenile did not challenge the dispositional level or type of disposition chosen by the trial court, the *Ferrell* opinion observed that a court’s discretion to fashion an appropriate disposition is not unlimited, noting the statutory parameters for selection of a disposition level that are set out in N.C. Gen. Stat. § 7B-2501(c). The opinion in *Ferrell* also quoted the requirement in N.C. Gen. Stat. § 7B-2512 that the court’s order “shall be in writing and shall contain *appropriate* findings of fact and conclusions of law.” (emphasis in original). We held that “the findings of fact in the dispositional order do not support the trial court’s decision to transfer custody of the juvenile from the mother to the father” and set aside that part of the disposition order. *Ferrell*, 162 N.C. App. at 177, 589 S.E.2d at 895.

Significantly, the issue addressed by our opinion in *Ferrell* was confined to the adequacy of the trial court’s findings to support its transfer of custody from the child’s mother to his father. The case did not involve any consideration of the court’s determination of the appropriate disposition level, which was not implicated in any manner by the court’s

IN RE D.E.P.

[251 N.C. App. 752 (2017)]

custody decision. Our opinion in *Ferrell* did not discuss the extent, if any, to which a disposition order must reference the factors set out in N.C. Gen. Stat. § 7B-2501 in order to justify the court's selection of a particular disposition. Moreover, the provision of the disposition order that was at issue in *Ferrell* - whether the juvenile's custody should be with his mother or with his father - is entirely separate from the determination of an appropriate disposition level. Thus, *Ferrell* did not hold that it is reversible error for a trial court to enter a disposition order that fails to include findings that demonstrate its consideration of the factors in N.C. Gen. Stat. § 7B-2501. In fact, *Ferrell* said nothing at all on this subject.

In *In re V.M.*, 211 N.C. App. 389, 391-92, 712 S.E.2d 213, 215 (2011), this Court stated as the basis for its ruling that "we have previously held that the trial court is required to make findings demonstrating that it considered the N.C.G.S. § 7B-2501(c) factors in a dispositional order entered in a juvenile delinquency matter[.]" and cited *Ferrell* as authority for this statement. However, *Ferrell* did not address the degree to which a court's findings must specifically reflect consideration of the factors listed in N.C. Gen. Stat. § 7B-2501(c), and did not set out any rule regarding this issue. Nonetheless, V.M.'s mischaracterization of *Ferrell* was repeated in several later cases. For example, in *In re J.J.*, 216 N.C. App. 366, 375, 717 S.E.2d 59, 65 (2011), the opinion quoted V.M. as follows:

[T]he trial court was required to make written findings of fact in its dispositional order. "[T]he trial court is required to make findings demonstrating that it considered the N.C.G.S. § 7B-2501(c) factors in a dispositional order entered in a juvenile delinquency matter." *In re V.M.*, [211] N.C. App. [389, 392], 712 S.E.2d 213, 215 (2011). Thus, the trial court erred in failing to include the requisite findings of fact in its dispositional order. Accordingly, we must vacate the trial court's dispositional order and remand the matter to the trial court to make the statutorily mandated findings of fact in the juvenile's written dispositional order.

See also, e.g., In re K.C., 226 N.C. App. 452, 462, 742 S.E.2d 239, 246 (2013) ("We have interpreted [§ 7B-2512] to require the juvenile court 'to make findings demonstrating that it considered the N.C.G.S. § 7B-2501(c) factors in a dispositional order entered in a juvenile delinquency matter.' *In re V.M.*, 211 N.C. App. 389, 391, 712 S.E.2d 213, 215 (2011)"), and *In re G.C.*, 230 N.C. App. 511, 520, 750 S.E.2d 548, 554 (2013) ("in *Ferrell*, the trial court's findings of fact were deemed to be insufficient because they did not fully address the factors laid out in § 7B-2501").

IN RE D.E.P.

[251 N.C. App. 752 (2017)]

It is axiomatic that “[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.” *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989). However, the opinion in *Ferrell* did not arrive at a determination or “decide” the issue of a trial court’s duty to include findings in its disposition order that match the factors in N.C. Gen. Stat. § 7B-2501. Nor did *V.M.* analyze or decide this issue; rather, the opinion merely referenced an erroneous characterization of the earlier opinion in *Ferrell*. As a result, our clarification of the actual holding of the *Ferrell* opinion does not constitute “overruling” *Ferrell* or any of the later cases that cited *Ferrell*.

The requirements for a dispositional order are governed by N.C. Gen. Stat. § 7B-2512, which states in relevant part that:

The dispositional order shall be in writing and shall contain appropriate findings of fact and conclusions of law. The court shall state with particularity, both orally and in the written order of disposition, the precise terms of the disposition including the kind, duration, and the person who is responsible for carrying out the disposition and the person or agency in whom custody is vested.

Upon careful review of the statutory language and our prior jurisprudence, we find no support for a conclusion that in every case the “appropriate” findings of fact must make reference to all of the factors listed in N.C. Gen. Stat. § 7B-2501(c), including those factors that were irrelevant to the case or in regard to which no evidence was introduced. However, because Daniel’s sole challenge to the sufficiency of the trial court’s findings of fact is that they fail to demonstrate consideration of the factors in N.C. Gen. Stat. § 7B-2501(c), we have reviewed this argument and conclude that the court’s findings indicate its consideration of these factors.

The trial court’s findings of fact are contained in an attachment to its dispositional order that is titled “Findings of Fact for [Daniel] Level 3 Commitment Order.” This attachment states that:

The juvenile was adjudicated on a serious charge of Robbery with a Dangerous weapon on July 16th, 2015, at a level 2. Eleven days later, he was charged with misdemeanor possession of marijuana, and was adjudicated on that charge on October 21st, 2015. The juvenile was originally compliant with the probationary term during

IN RE D.E.P.

[251 N.C. App. 752 (2017)]

October and November of 2015, engaging in the GAP program and doing his community service while residing with his grandmother. Starting in December, the juvenile [began] violating curfew orders, leaving his home all night on December 15th, and eventually leaving his grandmother's home permanently on December 29th, as well as moving in with his father who was a co-defendant on the underlying RWDW, in violation of his court order. He was also suspended 10 days from school for fighting. The juvenile admitted an MFR relating to these violations on March 1st 2016, and disposition was continued until April in order to give the juvenile one last opportunity to comply with the court orders. The court's orders required that the juvenile was placed back into the grandmother's home with his mother, the juvenile was to obtain a substance abuse assessment at McLeod, not be suspended from school or be late to school unexcused, cooperate with YFS, complete his community service hours, and cooperate with Access treatment. On March 3rd, the juvenile was suspended from school for fighting with another student. On March 22nd, the juvenile was absent from his second block class unexcused. An MFR was filed on 3/30/16 for these violations, and the juvenile admitted the MFR on 4/18/2016. The juvenile had also not received substance treatment at McLeod since the previous court date. While the juvenile did complete his community service hours and the GAP program, due to the serious nature of the underlying offense adjudicated, and the continued non-compliance with court orders regarding school, curfew, substance abuse treatment, and having contact with his father, the Court finds that a YDC is the most appropriate structure for the juvenile and the community's needs.

As discussed above, the factors upon which the trial court is directed to base its determination of the appropriate dispositional level include (1) the seriousness of the offense; (2) the need to hold the juvenile accountable; (3) the importance of protecting the public safety; (4) the degree of culpability indicated by the circumstances of the particular case; and (5) the rehabilitative and treatment needs of the juvenile as indicated by a risk and needs assessment. We conclude that the trial court's findings of fact demonstrate its consideration of these criteria.

The parties do not dispute that robbery with a dangerous weapon is a serious offense, and the trial court found that Daniel "was adjudicated

IN RE D.E.P.

[251 N.C. App. 752 (2017)]

on a serious charge of Robbery with a Dangerous weapon,” thereby demonstrating the court’s consideration of the “seriousness of the offense.” The trial court’s findings set out in some detail Daniel’s repeated failure to comply with the terms of his probation, despite being given several opportunities to remain on probation. These findings establish the court’s consideration of the “need to hold the juvenile accountable.” The trial court’s consideration of the need to protect the public is illustrated by its findings that Daniel was adjudicated for committing an armed robbery and that he has been suspended from school for fighting.

We next examine the extent to which the trial court’s findings demonstrate its consideration of Daniel’s “degree of culpability.” Upon Daniel’s adjudication as delinquent, the trial court had the authority to impose either a disposition Level 2-Intermediate or 3-Commitment. N.C. Gen. Stat. § 7B-2508(f) (2015). Daniel stresses on appeal that his co-defendant in this offense was his father. We presume that the trial court considered Daniel’s reduced level of culpability when it imposed a Level 2 disposition. The disposition order at issue on appeal is, however, based primarily upon Daniel’s repeated violations of probation rather than upon the offense for which Daniel was originally adjudicated delinquent. Accordingly, it is Daniel’s “degree of culpability” for his probation violations that is most relevant, rather than his role in the robbery. The court’s findings set out various ways in which Daniel violated probation, including possessing marijuana, violating curfew, missing school, and being suspended from school. These violations are based upon Daniel’s own actions and do not suggest that some other person was partly responsible for Daniel’s violating probation. As a result, these findings indicate that the trial court considered the degree to which Daniel was culpable as regards the violations of the terms of his probation. Finally, the dispositional order expressly references Daniel’s failure to obtain treatment for substance abuse, thus indicating the court’s consideration of Daniel’s rehabilitative and treatment needs. We conclude that the trial court’s findings of fact adequately demonstrate its consideration of the factors set out in N.C. Gen. Stat. § 7B-2501(c).

We have considered Daniel’s appellate argument urging us to reach a contrary result. We conclude, however, that Daniel is essentially contending that the trial court should have made different findings, based on Daniel’s assessment of the evidence, or that the trial court should have weighed the evidence differently. “It is, however, the ‘duty of the trial judge to weigh and consider all competent evidence, and pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn therefrom.’ ‘It is

IN RE D.E.P.

[251 N.C. App. 752 (2017)]

not the function of this Court to reweigh the evidence on appeal.’ ” *Burger v. Smith*, __ N.C. App. __, __, 776 S.E.2d 886, 896 (2015) (quoting *Sauls v. Sauls*, __ N.C. App. __, __, 763 S.E.2d 328, 330 (2014) (internal quotations omitted)).

We hold that the trial court was not required by N.C. Gen. Stat. § 7B-2512 to make findings of fact that expressly tracked each of the statutory factors listed in N.C. Gen. Stat. § 7B-2501(c). However, because this is the sole basis of Daniel’s challenge to the trial court’s findings, we have carefully reviewed the dispositional order and conclude that the order does, in fact, demonstrate the court’s consideration of the statutory factors. Given that Daniel has not challenged the court’s findings on any other basis, we are not required to further define the requirements for a court’s findings in a dispositional order, beyond the general requirement of N.C. Gen. Stat. § 7B-2512 that the findings be “appropriate.” In this regard, we note that N.C. Gen. Stat. § 1A-1 Rule, 52(a)(1) (2015) provides in relevant part that in “all actions tried upon the facts without a jury” the trial court “shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.” Thus, in every case in which a trial court sits without a jury, it must enter “appropriate” findings of fact. “What the evidence does in fact show is a matter the trial court is to resolve, and its determination should be stated in appropriate and adequate findings of fact.” *Farmers Bank v. Distributors*, 307 N.C. 342, 352, 298 S.E.2d 357, 363 (1983).

Trial Court’s Exercise of Discretion

[2] Daniel also contends that the trial court abused its discretion by imposing a Level 3 disposition. We conclude that Daniel has failed to establish that the trial court abused its discretion.

It has long been the rule that:

The abuse of discretion standard of review is applied to those decisions which necessarily require the exercise of judgment. The test for abuse of discretion is whether a decision “is manifestly unsupported by reason,” or “so arbitrary that it could not have been the result of a reasoned decision.” The intended operation of the test may be seen in light of the purpose of the reviewing court. Because the reviewing court does not in the first instance make the judgment, the purpose of the reviewing court is not to substitute its judgment in place of the decision maker. Rather, the reviewing court sits only to insure that

IN RE D.E.P.

[251 N.C. App. 752 (2017)]

the decision could, in light of the factual context in which it is made, be the product of reason.

Little v. Penn Ventilator Co., 317 N.C. 206, 218, 345 S.E.2d 204, 212 (1986) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985), and *State v. Wilson*, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985)).

On appeal, Daniel acknowledges his repeated violations of probation, but directs our attention to evidence in the record tending to show that Daniel faced difficult family circumstances and that he successfully completed some of the requirements of probation. The existence of such evidence, although it might have supported a decision by the trial court to impose a Level 2 disposition, does not support a conclusion that the trial court's decision to impose a Level 3 disposition was unreasonable. As discussed above, during the eight months following Daniel's placement on juvenile probation, his court counselor filed motions for review alleging violations of probation for, among other things, possession of marijuana, fighting at school, failing to attend school, failing to cooperate with his court counselor, failing to comply with his curfew, and absconding from the home where he had been ordered to reside. Despite Daniel's repeated probation violations, the trial court continued him on probation several times. The last time that Daniel was in court to address an alleged violation of probation, the trial court continued disposition for a month and entered an order expressly warning that if Daniel failed to comply with the terms of his probation, he would be sent to training school. However, Daniel continued to violate his probation even after being given another chance to continue on a Level 2 disposition. Under these circumstances, we cannot conclude that the trial court's decision to impose a Level 3 disposition was manifestly unsupported by reason.

For the reasons discussed above, we conclude that the trial court did not err in its disposition order, and that its order is hereby

AFFIRMED.

Judges ELMORE and DILLON concur.

IN RE FORECLOSURE OF COLLINS

[251 N.C. App. 764 (2017)]

IN THE MATTER OF THE FORECLOSURE OF REAL PROPERTY UNDER A DEED OF TRUST EXECUTED BY ROBERT C. COLLINS AND RHONDA B. COLLINS DATED JUNE 20, 2006 AND RECORDED ON JUNE 23, 2006 IN BOOK K-30 AT PAGE 975 IN THE MACON COUNTY PUBLIC REGISTRY, NORTH CAROLINA

No. COA16-655

Filed 7 February 2017

Mortgages and Deeds of Trust—deed of trust—foreclosure sale—power-of-sale provision—affidavit of default—holder of note

The trial court did not err by authorizing substitute trustee (Trustee Services of Carolina, LLC) to proceed with a foreclosure sale in accordance with the power-of-sale provision of the Deed of Trust. Beneficial Financial I Inc.'s (Beneficial) Assistant Secretary of Administrative Services' affidavit of default was properly admitted into evidence, and the trial court properly concluded that Beneficial was the holder of the Note.

Appeal by respondents from order entered 20 January 2016 by Judge Marvin Pope in Macon County Superior Court. Heard in the Court of Appeals 29 November 2016.

Katten Munchin Rosenman LLP, by Rebecca K. Lindahl and Daniel S. Trimmer, for petitioner-appellee.

Jones, Key, Melvin & Patton, P.A., by Fred H. Jones, for respondents-appellants.

ZACHARY, Judge.

Respondents appeal from an order authorizing Beneficial Financial I Inc., through substitute trustee Trustee Services of Carolina, LLC (Trustee Services), to proceed with foreclosure in accordance with the terms of the Deed of Trust secured by real property located at 212 Cedar Ridge Road, Franklin, North Carolina (the property). For the reasons that follow, we affirm.

I. Background

On 20 June 2006, Respondents borrowed \$102,726.34 by executing a loan agreement (the Note) in favor of Beneficial Mortgage Company of North Carolina (BMCNC). The Note was secured by a Deed of Trust that encumbered the property. In 2009, BMCNC merged with Beneficial Mortgage Company of Virginia (BMCV), which then merged with Beneficial Financial I Inc. (Beneficial).

IN RE FORECLOSURE OF COLLINS

[251 N.C. App. 764 (2017)]

Respondents later defaulted under the terms of the Note. As a result, Beneficial, through Trustee Services, initiated foreclosure proceedings pursuant to the power-of-sale provision contained in the Deed of Trust. The Notice of Hearing, dated 10 June 2013, indicated that “the current holder of the above-described Deed of Trust and the indebtedness secured thereby is: Beneficial I Inc Successor by Merger to Beneficial Mortgage Co of North Carolina.”

On 17 October 2013, the Clerk of Superior Court of Macon County conducted a hearing on the matter pursuant to N.C. Gen. Stat. § 45-21.16 and found, *inter alia*, that notice was given to the record owners of the property, that Beneficial was the holder of the Note, that the Note was in default, and that Beneficial had the right to foreclose under the power-of-sale provision in the Deed of Trust. That same day, the clerk entered an order allowing Trustee Services to proceed with the foreclosure sale. Respondents appealed the clerk’s order to Macon County Superior Court for *de novo* review.

On 19 January 2016, Judge Marvin Pope conducted the *de novo* hearing in the power-of-sale foreclosure proceeding. At the hearing, Beneficial introduced into evidence an Affidavit of Default that had been executed by Beneficial’s Assistant Secretary of Administrative Services, Cherron Martin. In Paragraph 3 of the affidavit, Martin averred that, based on her own personal knowledge of the business and loan records at issue, “BENEFICIAL is in possession of the original promissory note and/or loan agreement (“Note”) for this Loan. . . .” A number of exhibits were attached to Martin’s affidavit, including photocopies of the Note, the Deed of Trust, and merger documents pertaining to both BMCNC’s merger with BMCV and BMCV’s merger with Beneficial.

Respondents objected to the admission of Martin’s affidavit on three grounds: (1) the affidavit was signed in July 2013 and there was no indication as to whether the Note had been negotiated since then; (2) none of the averments established that Martin had personal knowledge of Beneficial’s possession of the Note; and (3) the affidavit was not accompanied by the original Note. After noting that Paragraph 3 of the affidavit says “Beneficial is in possession of the original promissory note and/or loan agreement for this loan[,]” Judge Pope overruled respondents’ objection.

Respondents also moved for a directed verdict “on the basis that [Beneficial] has failed to prove they’re the holder of the note and can’t proceed.” Judge Pope denied the motion. As a result, Martin’s affidavit was admitted into evidence, together with the accompanying exhibits.

IN RE FORECLOSURE OF COLLINS

[251 N.C. App. 764 (2017)]

On 20 January 2016, Judge Pope entered an order that authorized Trustee Services to proceed with the foreclosure on the property in accordance with the terms of the Deed of Trust. Respondents appeal.

II. Standard of Review and General Principles

“The applicable standard of review on appeal where, as here, the trial court sits without a jury, is whether competent evidence exists to support the trial court’s findings of fact and whether the conclusions reached were proper in light of the findings.” *In re Foreclosure of Adams*, 204 N.C. App. 318, 320, 693 S.E.2d 705, 708 (2010) (citation and quotation marks omitted). “Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding.” *Id.* at 321, 693 S.E.2d at 708 (citations and quotations marks omitted). “[T]he [trial] court’s findings of fact are conclusive if supported by competent evidence, even though other evidence might sustain contrary findings.” *Stephens v. Dortch*, 148 N.C. App. 509, 515, 558 S.E.2d 889, 892 (2002) (citations omitted). The trial court’s conclusions of law are subject to *de novo* review. *In re Foreclosure of Bass*, 366 N.C. 464, 467, 738 S.E.2d 173, 175 (2013).

Foreclosure by power-of-sale proceedings conducted pursuant to N.C. Gen. Stat. § 45-21.16 are limited in scope. A power-of-sale provision contained in a deed of trust vests the trustee with the “power to sell the real property mortgaged without any order of court in the event of a default.” *In re Foreclosure of Michael Weinman Assocs. Gen. P’ship*, 333 N.C. 221, 227, 424 S.E.2d 385, 388 (1993) (citation and internal quotation marks omitted). After the trustee files a notice of hearing with the clerk of superior court and serves that notice on the necessary parties, the clerk must conduct a hearing on the matter. N.C. Gen. Stat. § 45-21.16(a), (d) (2015). At the hearing, the petitioner must present evidence that establishes the following six criteria before the clerk of court may authorize the trustee to proceed with the foreclosure under a power-of-sale provision:

- (i) [a] valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) [a] right to foreclose under the instrument, (iv) notice to those entitled to such under subsection (b), (v) that the underlying mortgage debt is not a home loan as defined in G.S. 45-101(1b) . . . and (vi) that the sale is not barred by G.S. 45-21.12A[.]

Id. § 45-21.6(d). At a section 45-21.16 foreclosure hearing, “the clerk . . . is limited to making the six findings of fact specified under subsection (d)[.]” *In re Foreclosure of Young*, 227 N.C. App. 502, 505, 744

IN RE FORECLOSURE OF COLLINS

[251 N.C. App. 764 (2017)]

S.E.2d 476, 479 (2013). Although the clerk's decision may be appealed to superior court for a hearing *de novo*, N.C. Gen. Stat. § 45-21.16(d1), the superior court is similarly limited to determining whether the petitioner has satisfied the six criteria contained in subsection 45-21.16(d). *In re Foreclosure of Carter*, 219 N.C. App. 370, 373, 725 S.E.2d 22, 24 (2012). However, upon *de novo* review, the superior court may consider evidence of legal defenses that would negate the findings required under subsection 45-21.16(d). *In re Foreclosure of Goforth Properties, Inc.*, 334 N.C. 369, 375, 432 S.E.2d 855, 859 (1993).

Moreover, in a power-of-sale foreclosure hearing, "the clerk shall consider the evidence of the parties and may consider . . . affidavits and certified copies of documents." N.C. Gen. Stat. § 45-21.16(d). Affidavits may also be used as competent evidence to establish the required statutory elements in *de novo* foreclosure hearings. *In re Foreclosure of Brown*, 156 N.C. App. 477, 486-87, 577 S.E.2d 398, 404-05 (2003).

III. Analysis

On appeal, Respondents make a series of separate but related arguments that no competent evidence demonstrated that Beneficial was the holder of the Note at the time of the *de novo* hearing. We disagree.

Determination that a party is the holder of a valid debt requires competent evidence (1) of a valid debt and (2) that the party seeking to foreclose is the holder of the promissory note that secures the debt. *In re Foreclosure of Adams*, 204 N.C. App. at 321-22, 693 S.E.2d at 709. "[T]he definition of 'holder' under the Uniform Commercial Code ('UCC'), as adopted by North Carolina, controls the meaning of the term as it is used in section 45-21.16 of our General Statutes[.]" *In re Foreclosure by David A. Simpson, P.C.*, 211 N.C. App. 483, 490, 711 S.E.2d 165, 171 (2011). The UCC's definition of a "holder" includes "[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession[.]" N.C. Gen. Stat. § 25-1-201(b)(21)(a) (2015). In determining whether a person is the holder of an instrument, "[i]t is the fact of possession which is significant . . . , and the absence of possession defeats that status." *Connolly v. Potts*, 63 N.C. App. 547, 550, 306 S.E.2d 123, 125 (1983). Yet so long as "there is no evidence that photocopies of a note or deed of trust are not exact reproductions of the original instruments, a party need not present the original note or deed of trust and may establish that it is the holder of the instruments by presenting photocopies of the note or deed of trust." *Dobson v. Substitute Tr. Servs., Inc.*, 212 N.C. App. 45, 48, 711 S.E.2d 728, 730 (2011).

IN RE FORECLOSURE OF COLLINS

[251 N.C. App. 764 (2017)]

Respondents first argue that because over two and half years passed between the execution of Martin's affidavit (July 2013) and the *de novo* hearing in superior court (January 2016), "the possibility exists that the Note had been negotiated at some point" during that period of time.

Other than engaging in speculation, Respondents neither offer a colorable reason nor cite any pertinent case law as to why their contention should prevail. Nothing in the record suggests that Beneficial negotiated or transferred the Note to another party before the *de novo* hearing was held. As a result, we conclude that this argument is without merit.

Respondents next argue that the terminology used in Martin's affidavit "provides no basis to conclude that she has personal knowledge of the alleged fact that Beneficial was 'in possession' of the original note[.]" The affidavit states, in pertinent part, that "[i]n the regular performance of my job functions, I have access to and am familiar with business records maintained by BENEFICIAL for the purpose of servicing mortgage loans." According to Respondents, this language established that Martin's area of responsibility concerns only "servicing" loans, and there is no "indication that Ms. Martin's responsibilities extend to knowledge of the lender's inventory of negotiable instruments, or the status of its corporate existence—including merger or succession." Thus, Respondents insist that the affidavit is not competent evidence of Beneficial's physical possession of the Note or the merger.

Generally, a "witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself." N.C. Gen. Stat. § 8C-1, Rule 602 (2015).

Rule 56(e) of the North Carolina Rules of Civil Procedure provides that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Civil Procedure Rule 43(e) provides, in relevant part, that "[w]hen a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties. . . ." While Rule 56(e) specifically applies to summary judgment motions, "this Court has held the N.C. R. Civ. Pro. 56(e) requirement that affidavits must be based upon personal knowledge applies to Rule 43(e)." *Lemon v. Combs*, 164 N.C. App. 615, 621, 596 S.E.2d 344, 348 (2004). As noted by the *Lemon* Court, "[a]lthough an affidavit must be verified by a person with personal knowledge of the facts, the court may

IN RE FORECLOSURE OF COLLINS

[251 N.C. App. 764 (2017)]

rely on reasonable inferences drawn from the facts stated.’ ” *Id.* at 622, 596 S.E.2d at 348 (citation omitted).

Here, there was an ample basis upon which to infer that Martin had personal knowledge of the Note’s existence and status. Martin’s affidavit established that she was an executive in Beneficial’s Administrative Services Division, that she had “personal knowledge of the manner in which [Beneficial’s loan documents were] created,” and that she had “reviewed and relied on those business records concerning the loan which [was] the subject of [the foreclosure] proceeding.” The affidavit also correctly identified the amount of the loan evidenced by the Note and the Deed of Trust that secured the Note. Accordingly, Martin’s affidavit was based on her personal knowledge and respondent’s argument is overruled.

Moreover, based on the facts stated in the affidavit, we conclude that Martin had personal knowledge of Beneficial’s corporate status. Even so, it is irrelevant whether Martin had any knowledge of the mergers that resulted in the formation of Beneficial—in addition to Martin’s affidavit, several other documents establish that Beneficial is the successor by merger to BMCNC. Beneficial’s Exhibit 3 contains official documents from the Secretaries of State of North Carolina, Delaware, and California showing that BMCNC merged with BMCV, and that BMCV merged with Beneficial. Exhibit 4, an Appointment of Substitute Trustee form in which the original trustee is replaced by Trustee Services, specifically states that “Beneficial Financial I Inc. Successor by Merger to Beneficial Mortgage Co. of North Carolina (“Holder”) is the holder of the Note.” As Respondents make no challenge to the content of these exhibits, we conclude that the trial court had competent evidence of the merger and transfer of rights before it. In sum, our review of the record reveals that the trial court did not abuse its discretion in admitting Martin’s affidavit into evidence. *See In re Simpson*, 211 N.C. App. at 488, 711 S.E.2d at 170 (“The admissibility of evidence in the trial court is based upon that court’s sound discretion and may be disturbed on appeal only upon a finding that the decision was based on an abuse of discretion.”).

Respondents’ final argument is that the trial court erred by concluding that Beneficial was the holder of the Note without making a specific finding that Beneficial was in physical possession of the Note.

This Court has previously held that when a trial court’s findings of fact do not address the actual physical possession of a promissory note, the court’s findings will not support a conclusion that the petitioner in a

IN RE FORECLOSURE OF COLLINS

[251 N.C. App. 764 (2017)]

foreclosure proceeding is the holder of the note at issue. *Id.* at 492, 711 S.E.2d at 172; *Connolly*, 63 N.C. App. at 551, 306 S.E.2d at 125. However, “‘when a court fails to make appropriate findings or conclusions, this Court is not required to remand the matter if the facts are not in dispute and only one inference can be drawn from them.’” *In re Foreclosure of Yopp*, 217 N.C. App. 488, 499, 720 S.E.2d 769, 775 (2011) (brackets omitted) (quoting *Green Tree Financial Servicing Corp. v. Young*, 133 N.C. App. 339, 341, 515 S.E.2d 223, 224 (1999)).

Here, Beneficial produced a copy of the original Note at the *de novo* hearing. While Respondents opposed the admission of the Note and Deed of Trust into evidence based on alleged deficiencies in Martin’s affidavit, they did not dispute Beneficial’s assertion that the photocopy of the Note was a true copy of the original instrument. There being no requirement that the original Note be produced, the photocopy was competent evidence that Beneficial was the holder of Respondent’s Note. See *Dobson*, 212 N.C. App. at 48, 711 S.E.2d at 730 (noting that unless evidence demonstrates that photocopies of a note or deed of trust “are not exact reproductions of the original instruments, “a party . . . may establish that it is the holder of the instruments by presenting photocopies of the note or deed of trust”).

Furthermore, Martin’s affidavit, which we have held was properly admitted, contained additional evidence indicating that Beneficial was in physical possession of Respondent’s Note. Martin specifically averred that “BENEFICIAL is in possession of the original promissory note and/or loan agreement (“Note”) for this Loan. . . .”

Finally, the record contains sufficient evidence of the merger and transfer of rights from BMCNC to Beneficial to support the trial court’s conclusion that Beneficial is the holder of the Note. See *Econo-Travel Motor Hotel Corp. v. Taylor*, 301 N.C. 200, 204, 271 S.E.2d 54, 58 (1980) (noting that “if the alleged merger had occurred, then plaintiff, as the surviving corporation, would have succeeded by operation of law to Econo-Travel Corporation’s status as owner and holder of the promissory note, and would have had standing to enforce the note in its own name”); *In re Foreclosure of Carver Pond I, L.P.*, 217 N.C. App. 352, 356, 719 S.E.2d 207, 210-11 (2011) (holding that evidence of a merger between former assignee of a promissory note and the petitioner in an action to foreclose pursuant to the terms of the deed of trust that secured that note was competent evidence that the petitioner was the holder of the note). The inferences that Beneficial merged with BMCNC, thereby succeeding by operation of law to BMCNC’s status as holder

JACKSON/HILL AVIATION, INC. v. TOWN OF OCEAN ISLE BEACH

[251 N.C. App. 771 (2017)]

of the Note, and that Beneficial was in physical possession of the Note at the time of the *de novo* hearing, are easily drawn from the evidence cited above. Accordingly, the trial court properly concluded that Beneficial was the holder of the note.

IV. Conclusion

For the reasons stated above, Martin's affidavit was properly admitted into evidence and the trial court did not err in concluding that Beneficial was the holder of the Note. Consequently, we affirm the trial court's order authorizing Trustee Services to proceed with the foreclosure sale.

AFFIRMED.

Judges CALABRIA and INMAN concur.

JACKSON/HILL AVIATION, INC., PLAINTIFF

v.

TOWN OF OCEAN ISLE BEACH; DEBBIE S. SMITH, MAYOR; DAISY IVEY, TOWN ADMINISTRATOR; LARRY SELLERS, ASSISTANT TOWN ADMINISTRATOR; D.B. GRANTHAM, COMMISSIONER; R. WAYNE ROWELL, COMMISSIONER; BETTY WILLIAMSON, COMMISSIONER; BOB WILLIAMS, COMMISSIONER; AND DEAN WALTERS, COMMISSIONER, DEFENDANTS

No. COA16-396

Filed 7 February 2017

Cities and Towns—operation of airport—motion to dismiss—judicial notice of municipal ordinances improper

The trial court erred in a contract dispute case, arising out of the operation of a small airport, by allowing defendant town's motion to dismiss. The town's ordinance was not mentioned in the complaint, and courts cannot take judicial notice of the provisions of municipal ordinances. Even if the ordinance could be considered at the pleadings stage, plaintiff asserted waiver and estoppel arguments that would preclude judgment as a matter of law.

Appeal by plaintiff from order and judgment entered 2 November 2015 by Judge Ola M. Lewis in Brunswick County Superior Court. Heard in the Court of Appeals 3 October 2016.

JACKSON/HILL AVIATION, INC. v. TOWN OF OCEAN ISLE BEACH

[251 N.C. App. 771 (2017)]

Thorp & Clarke, P.A., by F. Stuart Clarke, for plaintiff-appellant.

Crossley, McIntosh, Collier, Hanley & Edes, PLLC, by Clay Allen Collier, for defendants-appellees.

DIETZ, Judge.

This case concerns the operation of a small airport in the town of Ocean Isle Beach. Jackson/Hill Aviation, Inc. contracted with the town to operate the airport. A dispute later broke out because Jackson/Hill did not always staff the airport with an employee. Ocean Isle Beach asserted that the provisions of a town ordinance require the airport to be staffed during normal business hours and that the contract requires Jackson/Hill to comply with that ordinance. Thus, the town argued, Jackson/Hill breached the contract.

After the town took over control of the airport and locked Jackson/Hill out, the company sued. Ocean Isle Beach moved to dismiss, pointing to Jackson/Hill's admission in the complaint that it did not staff the airport during all normal business hours, to the terms of the contract (attached to the complaint), and to the terms of the town's ordinance, which the town attached to its motion to dismiss. The trial court granted the motion and dismissed all claims.

We reverse. The town's ordinance is not mentioned in the complaint, and it is well-settled that courts "cannot take judicial notice of the provisions of municipal ordinances." *McEwen Funeral Serv., Inc. v. Charlotte City Coach Lines, Inc.*, 248 N.C. 146, 150–51, 102 S.E.2d 816, 820 (1958). Because all of the town's arguments for dismissal require consideration of the terms of the ordinance, dismissal under Rule 12(b)(6) was improper. Moreover, even if the ordinance could be considered at the pleadings stage, Jackson/Hill asserts waiver and estoppel arguments that would preclude judgment as a matter of law at the pleadings stage. Accordingly, we reverse the trial court and remand for further proceedings consistent with this opinion.

Facts and Procedural History

Jackson/Hill Aviation, Inc. operated a small airport on property it leased from the Town of Ocean Isle Beach. In 2014, the parties began to dispute the scope of the contract and, in particular, whether the contract required Jackson/Hill to staff the airport with at least one employee during all normal business hours. The contract, which is attached to the complaint, provides as follows:

JACKSON/HILL AVIATION, INC. v. TOWN OF OCEAN ISLE BEACH

[251 N.C. App. 771 (2017)]

Both parties anticipate that the property shall be used as a fixed based [sic] operation, with fuel services and other services as may be reasonable due to the traffic and clientele demands. . . . LESSOR agrees that the structure, while intended to permit it to operate a business for the repair, maintenance, painting, refurbishing, tooling and retooling and outfitting of aircraft shall be open and operational during regular business hours based upon the following schedule:

- a) From Good Friday of each year through Labor Day, Monday through Saturday from 9:00 a.m. until 5:00 p.m.;
- b) At all other times of the year the facility will be open from 9:00 a.m. until 5:00 p.m. on Saturday and Sunday of each week;
- c) The facility will provide a fuel operation that will provide fuel at all times of the day and night, every day of the year;
- d) The facility will provide for access to a restroom and a telephone for pilots who will be provided with a means to gain safe access to the facility that is in keeping with general FAA rules and regulations.

. . .

TENANT shall, at all times, in the use and occupancy of the Demised Premises and the performance of this lease, comply with all State, Federal and local governmental laws, regulatory, statutory or other, rules or regulations applicable to the use and occupancy of the Demised Premises

A town ordinance, which Ocean Isle Beach attached to its motion to dismiss, states as follows:

Regulations governing minimum requirements for all fixed base operations.

(a) [*Full-time business.*] All fixed base operations at the airport shall be a full-time business, with manned office facility at the airport during business hours. No fixed base operator shall be allowed to operate on the airport without a fully executed lease agreement with the owner.

(brackets in original).

JACKSON/HILL AVIATION, INC. v. TOWN OF OCEAN ISLE BEACH

[251 N.C. App. 771 (2017)]

Ultimately, the town asserted that Jackson/Hill breached the contract. Town officials changed the locks on the airport facilities and took over all operations.

Jackson/Hill sued the town and various town officials for wrongful eviction, wrongful termination of the lease, breach of the covenant of quiet enjoyment, unfair and deceptive trade practices, tortious interference with contract, trespass, interference with use and enjoyment of property, and claims for declaratory and injunctive relief.

Ocean Isle Beach moved to dismiss the complaint for failure to state a claim on which relief could be granted. The trial court granted the motion and dismissed all claims. Jackson/Hill appealed. As initially filed, the record on appeal indicated that the appeal was untimely. After this Court requested supplemental briefing concerning our jurisdiction, Jackson/Hill supplemented the record with documents indicating the appeal was timely.

Argument

Jackson/Hill argues that dismissal was improper because its complaint properly states claims against the town and its officials. We agree.

“This Court reviews the grant of a Rule 12(b)(6) motion to dismiss *de novo*.” *Shannon v. Testen*, __ N.C. App. __, __, 777 S.E.2d 153, 156 (2015). “We examine whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory.” *Id.* “Dismissal is only appropriate if it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim.”¹ *Id.*

The town does not dispute that the complaint, standing alone, properly states a claim with respect to each cause of action. But the town argues that the allegations in the complaint, combined with the terms of a town ordinance, demonstrate that Jackson/Hill cannot prove any set of facts that would entitle it to recover.

Specifically, the town points to the provision in its ordinances stating that “[a]ll fixed base operations at the airport shall be a full-time business, with manned office facility at the airport during business hours.”

1. In a single filing, the town moved to dismiss under Rule 12(b)(6) and moved for judgment on the pleadings under Rule 12(c). Because the town had not yet filed an answer, the pleadings were not “closed” and thus a Rule 12(c) motion was not yet available. *See Carpenter v. Carpenter*, 189 N.C. App. 755, 762, 659 S.E.2d 762, 767 (2008). Thus, we review the dismissal order as one allowed solely under Rule 12(b)(6).

JACKSON/HILL AVIATION, INC. v. TOWN OF OCEAN ISLE BEACH

[251 N.C. App. 771 (2017)]

The lease agreement, which is attached to the complaint and thus can be considered on a motion to dismiss, contains a provision requiring Jackson/Hill to “comply with all State, Federal and local government laws, regulatory, statutory or other, rules or regulations applicable to the use and occupancy” of the airport. The town argues that, because Jackson/Hill admits in the complaint that it did not staff the airport with an employee “during business hours,” the facts alleged in the complaint (when considered along with the relevant terms of the contract and the ordinance) defeat Jackson/Hill’s claims, all of which depend on Jackson/Hill proving that it did not breach the terms of the lease.

There is an obvious (and fatal) flaw in the town’s reasoning: the complaint does not allege the existence of the town ordinance or describe what that ordinance says. At the motion to dismiss stage, the trial court (and this Court) may not consider evidence outside the four corners of the complaint and the attached contract. *Weaver v. Saint Joseph of the Pines, Inc.*, 187 N.C. App. 198, 203–04, 652 S.E.2d 701, 707 (2007).

The town notes that courts may use judicial notice “to consider laws, administrative regulations, important public documents and a range of miscellaneous facts” and suggests that this is precisely what the trial court did when it considered the ordinance below. But, as the town then concedes in the following paragraph of its brief, our Supreme Court repeatedly has held that courts “cannot take judicial notice of the provisions of municipal ordinances.” *McEwen Funeral Serv., Inc. v. Charlotte City Coach Lines, Inc.*, 248 N.C. 146, 150–51, 102 S.E.2d 816, 820 (1958).

The town also argues that it attached the ordinance to its motion to dismiss and thus the ordinance appears “in the Record before this Court.” But the fact that the ordinance is in the *appellate record* is irrelevant. What matters is whether the terms of the ordinance properly could be considered by the trial court *at the pleadings stage* under Rule 12(b)(6). Perhaps the most fundamental concept of motions practice under Rule 12 is that evidence outside the pleadings—such as a document attached to a motion to dismiss—cannot be considered in determining whether the complaint states a claim on which relief can be granted. *See Weaver*, 187 N.C. App. at 203, 652 S.E.2d at 707.

Simply put, the town’s ordinance cannot be considered on a motion to dismiss under Rule 12(b)(6). Because all of the town’s arguments require us to consider the ordinance, we must reject those arguments.

We also note that, even if we agreed with the town’s interpretation of the contract and could consider the terms of the town’s ordinance,

PERRY v. BANK OF AM., N.A.

[251 N.C. App. 776 (2017)]

that would not end this case. Jackson/Hill argues that the town waived application of the portions of the contract concerning the ordinance. *See Wheeler v. Wheeler*, 299 N.C. 633, 639, 263 S.E.2d 763, 766–67 (1980). It also argues that the town is estopped from using the ordinance against it in light of the terms of the contract and statements and actions by town officials. *See Parkersmith Props. v. Johnson*, 136 N.C. App. 626, 632–33, 525 S.E.2d 491, 495–96 (2000). Thus, many legal issues remain to be resolved before final judgment may be entered in this case.

Conclusion

The trial court erred by granting Ocean Isle Beach’s motion to dismiss for failure to state a claim and alternative motion for judgment on the pleadings. We reverse the trial court’s order and judgment and remand for further proceedings.

REVERSED AND REMANDED.

Chief Judge McGEE and Judge TYSON concur.

DONALD WAYNE PERRY SR. AND WIFE PATSY K. PERRY, PLAINTIFFS
v.
BANK OF AMERICA, N.A., DEFENDANT

No. COA16-234

Filed 7 February 2017

1. Declaratory Judgments—motion to dismiss—actual dispute—fraud

The trial court erred by dismissing plaintiffs’ claim for declaratory judgment. Plaintiffs alleged an actual dispute over whether they were obligated to pay balances on lines of credit which they contended were the result of fraud.

2. Damages and Remedies—N.C.G.S. § 45–36.9—debtor relief—statutory damages—attorney fees—court costs

The trial court did not err by dismissing plaintiffs’ claim for violation of N.C.G.S. § 45–36.9 that permits a debtor to seek statutory damages, attorney fees, and court costs if a creditor fails to record a satisfaction when required to do so. The complaint, on its face, failed to allege any point at which the line of credit had a zero balance and plaintiffs requested that the bank record a satisfaction.

PERRY v. BANK OF AM., N.A.

[251 N.C. App. 776 (2017)]

Appeal by plaintiffs from order entered 29 December 2015 by Judge Kevin M. Bridges in Stanly County Superior Court. Heard in the Court of Appeals 8 September 2016.

Scarbrough & Scarbrough, PLLC, by James E. Scarbrough and John F. Scarbrough, for plaintiffs-appellants.

McGuireWoods LLP, by Scott I. Perle and Monica E. Webb, for defendant-appellee.

DIETZ, Judge.

Plaintiffs Donald Wayne Perry, Sr. and Patsy K. Perry appeal from the dismissal of their lawsuit against Bank of America. The Perrys have home equity lines of credit with Bank of America and are in default on their payments. The Perrys contend that they are not obligated to pay the outstanding balances because those balances were procured through fraud by their son, who withdrew funds from the credit lines without his parents' authorization.

As explained below, we affirm in part and reverse in part. The Perrys sought a declaration that they were not obligated to repay the balances on the lines of credit. The sole basis on which Bank of America defends the dismissal of that declaratory judgment claim is that the claim does not allege an actual controversy. As explained below, although there may be other grounds to dismiss the claim, the claim satisfies the legal criteria for declaratory relief, and thus we reverse the dismissal of that claim and remand for further proceedings. We affirm the trial court's dismissal of the Perrys' claim under N.C. Gen. Stat. § 45–36.9 because it fails to state a claim on which relief can be granted.

Facts and Procedural History

On 17 December 2014, Plaintiffs Donald Wayne Perry, Sr. and Patsy K. Perry sued Defendant Bank of America, N.A. The Perrys' complaint, as amended, asserted claims for declaratory judgment, violation of N.C. Gen. Stat. § 45–36.9, injury to credit, and punitive damages. The claims arise from two home equity lines of credit that the Perrys obtained from Bank of America or its predecessors.

In 1996, Plaintiffs obtained an equity line loan with a credit limit of \$33,100.00 secured by a deed of trust on real property located in Locust, North Carolina. In 2003, the Perrys used a mortgage loan to pay off the balance on the 1996 equity line. In 2007, the Perrys obtained a second

PERRY v. BANK OF AM., N.A.

[251 N.C. App. 776 (2017)]

home equity line of credit with a credit limit of \$124,000.00 secured by a deed of trust on real property located in Charlotte, North Carolina.

In 2014, the Perrys received a notice from Bank of America that the 1996 equity line was delinquent with an outstanding balance of \$19,451.27. The Perrys also discovered that there was a balance owed on the 2007 line of credit in excess of the \$124,000 limit. According to the complaint, the Perrys believed the 1996 line of credit had been cancelled when they paid off the balance using the proceeds of their mortgage loan in 2003. The Perrys also alleged that the balances on both lines of credit were incurred through fraud by their son, who was not authorized to withdraw funds from the lines of credit. Finally, the Perrys alleged that they demanded that Bank of America cancel the deeds of trust securing the lines of credit because they owed no balance on either account but the bank refused to do so.

On 23 September 2015, Bank of America moved to dismiss the Perrys' amended complaint. After a hearing, the trial court granted the bank's motion and dismissed all claims in the amended complaint.¹ The Perrys timely appealed.

Analysis**I. Dismissal of Declaratory Judgment Claim**

[1] The Perrys first argue that the trial court erred in dismissing their claim for declaratory judgment. As explained below, in light of the only argument Bank of America asserts on appeal, we agree that the trial court erred by dismissing this claim.

As a general principle, the North Carolina Uniform Declaratory Judgment Act permits a litigant to seek a declaration of the rights or obligations of parties to a written contract when there is some dispute among the parties concerning those respective rights or obligations:

Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other

1. In this appeal, the Perrys do not challenge the dismissal of their claim for injury to credit and their request for punitive damages, and thus any issues concerning those portions of the trial court's order are abandoned. *See* N.C. R. App. P. 28(b)(6).

PERRY v. BANK OF AM., N.A.

[251 N.C. App. 776 (2017)]

legal relations thereunder. A contract may be construed either before or after there has been a breach thereof.

N.C. Gen. Stat. § 1–254.

Here, the Perrys allege that they have home equity lines of credit with Bank of America, that Bank of America informed them that they are in default for failure to make required payments on those lines of credit, and that the Perrys believe they are not obligated to pay the balances on those lines of credit because the balances were procured by fraud.

On appeal, Bank of America does not contend that the Perrys cannot succeed on the merits of their request for declaratory relief. Instead, the bank contends that the Perrys failed to allege “any actual, genuine controversy” and thus the trial court properly dismissed the claim. Specifically, the bank contends that the Perrys “do not seek construction or interpretation of any contract here, instead merely asking the trial court to resolve purported issues of fact regarding the balances on the account.”

We agree with Bank of America that resolving a dispute over the balance in a bank account, or the amount due on a loan, is not the type of controversy that can be resolved using the Declaratory Judgment Act. The Act exists to permits courts “to declare rights, status, and other legal relations,” not to serve as arbiters of routine fact disputes that arise in people’s dealings with one another. N.C. Gen. Stat. § 1–253.

But to say that the Perrys seek only a declaration of what they owe the bank would mischaracterize their claim for relief. The Perrys allege that they are not legally obligated to pay the balances on the lines of credit because those balances were procedure by fraud. They further allege that the bank believes they must pay and has threatened to act on their purported default.

As the Georgia Court of Appeals succinctly explained, “the object of the declaratory judgment is to permit determination of a controversy before obligations are repudiated or rights are violated.” *Watts v. Promina Gwinnett Health Sys., Inc.*, 242 Ga. App. 377, 381, 530 S.E.2d 14, 18 (2000). Declaratory relief serves “to permit one who is walking in the dark to ascertain where he is and where he is going, to turn on the light before he steps rather than after he has stepped in a hole.” *Id.*

That is precisely what the Perrys seek to do here. They contend that they have no legal obligation to repay the loans because the balance was procured through fraud, and they seek a declaration of that legal obligation so that they can know now whether they must repay the loans—without having to wait for the bank to foreclose on their home when

PERRY v. BANK OF AM., N.A.

[251 N.C. App. 776 (2017)]

they refuse to pay. This is an actual, genuine controversy concerning the parties' respective legal rights and obligations under the contracts governing the lines of credit. *Goldston v. State*, 361 N.C. 26, 37, 637 S.E.2d 876, 883 (2006).

To be sure, Bank of America also argues that the Perrys failed to provide any "legal authority" to support their argument that they are not obligated to pay the balance on their credit lines. But on appeal (and, from the record before us, in the trial court as well) Bank of America never provided any legal authority on this issue either. If the bank had shown that, as a matter of law, the Perrys still would be obligated to repay the line of credit even if the balance was the result of fraud by their son, we readily could affirm the trial court's dismissal on this alternative ground. *See State v. Austin*, 320 N.C. 276, 290, 357 S.E.2d 641, 650 (1987). But we are unwilling to address this issue on our own without the benefit of briefing by the parties. "The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983). Because neither party addressed this legal issue—either on appeal or in the trial court—we decline to address it as well.

Bank of America also contends that the trial court had discretion to decline to hear the Perrys' request for declaratory judgment. The bank asserts that the trial court's dismissal was simply an exercise of this discretion. But a trial court's discretion to decline a request for declaratory relief has been limited by our Supreme Court. As the Supreme Court explained in *Augur v. Augur*, the Declaratory Judgment Act "permits a trial court, in the exercise of its discretion, to decline a request for declaratory relief when (1) the requested declaration will serve no useful purpose in clarifying or settling the legal relations at issue; or (2) the requested declaration will not terminate or afford relief from the uncertainty, insecurity, or controversy giving rise to the proceeding." 356 N.C. 582, 588–89, 573 S.E.2d 125, 130 (2002). For the reasons discussed above, neither of these two criteria are satisfied here. If the trial court entered the requested declaration, it would settle a legal dispute—whether the Perrys are required by the contract to pay the balance on their lines of credit despite their allegations of fraud—and it would afford the Perrys relief from the uncertainty and controversy surrounding their purported default on those lines of credit.

In short, we are constrained to reverse the trial court's dismissal of this claim. The Perrys alleged more than a "mere difference of opinion

PERRY v. BANK OF AM., N.A.

[251 N.C. App. 776 (2017)]

between the parties, without any practical bearing on any contemplated action.” *Calton v. Calton*, 118 N.C. App. 439, 442, 456 S.E.2d. 520, 522 (1995). They alleged an actual dispute over whether they are obligated to pay balances on lines of credit which they contend are the result of fraud.

Of course, our holding does not mean that the Perrys are likely to succeed on this claim or that the trial court cannot dismiss the claim on other grounds on remand. We merely reject the argument that this claim is not suitable for resolution under the Declaratory Judgment Act—the sole basis on which the bank defended the trial court’s ruling on appeal.

II. Dismissal of N.C. Gen. Stat. § 45–36.9 Claim

[2] The Perrys next contend that the trial court erred in dismissing their claim for violation of N.C. Gen. Stat. § 45–36.9. We disagree.

Section 45–36.9 permits a debtor to seek statutory damages, attorneys’ fees, and court costs if a creditor fails to record a satisfaction when required to do so. To state a claim under N.C. Gen. Stat. § 45–36.9 with respect to a line of credit, the plaintiff must allege that the line of credit was paid in full *and* that the plaintiff notified the creditor that it requested termination:

A secured creditor shall submit for recording a satisfaction of a security instrument within 30 days after the creditor receives full payment or performance of the secured obligation. *If a security instrument secures a line of credit or future advances, the secured obligation is fully performed only if, in addition to full payment, the secured creditor has received (i) a notification requesting the creditor to terminate the line of credit, (ii) a credit suspension directive, or (iii) a notification containing a clear and unambiguous statement sufficient to terminate the effectiveness of the provision for future advances in the security instrument including, but not limited to, a request to terminate an equity line of credit given pursuant to G.S. 45–82.2 or a notice regarding future advances given pursuant to 45–82.3.*

N.C. Gen. Stat. § 45–36.9(a) (emphasis added).

Here, the complaint alleges that the accounts at issue were lines of credit. But the complaint, on its face, fails to allege any point at which the line of credit had a zero balance *and* the Perrys requested that the bank record a satisfaction under section 45–36.9. The complaint alleges that the accounts had a zero balance in 2003, but does not allege that the

REED v. CAROLINA HOLDINGS

[251 N.C. App. 782 (2017)]

Perrys notified the bank to cancel the security instrument at that time. Likewise, the complaint alleges that the Perrys requested cancellation of the security instrument in September 2014. But by that time, according to the complaint, the account had a balance of \$19,451.27. Thus, the Perrys' complaint fails to state a claim on which relief could be granted under section 45–36.9, and the trial court properly dismissed that claim.

Conclusion

For the reasons discussed above, we affirm the portion of the trial court's order dismissing the Perrys' claim under N.C. Gen. Stat. § 45–36.9. We reverse the portion of the trial court's order dismissing the Perrys' claim under the North Carolina Uniform Declaratory Judgment Act.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

Judges HUNTER, JR. and McCULLOUGH concur.

CHRISTOPHER S. REED, EMPLOYEE, PLAINTIFF

v.

CAROLINA HOLDINGS, WOLSELEY MANAGEMENT, EMPLOYER,
ACE USA/ESIS, CARRIER, DEFENDANTS

No. COA15-1034

Filed 7 February 2017

1. Appeal and Error—preservation of issues—attorney fees—failure to raise issue before Industrial Commission

Defendants' appeal of the Industrial Commission's award of attorney fees in a workers' compensation case was dismissed. There was no indication in the record that defendants raised the issue before the Commission and there was no indication that the Commission addressed the issue.

2. Workers' Compensation—attendant care compensation—sufficiency of findings—reasonable and necessary

The Industrial Commission did not err in a workers' compensation case by awarding attendant care compensation. The Commission's findings of fact were supported by competent evidence and supported the Commission's conclusion of law that the services were reasonable and necessary.

REED v. CAROLINA HOLDINGS

[251 N.C. App. 782 (2017)]

Judge TYSON concurring in part and dissenting in part.

Appeal by Defendants from an Opinion and Award entered 17 April 2015 by the Full North Carolina Industrial Commission. Heard in the Court of Appeals 7 June 2016.

Lennon, Camak & Bertics, PLLC, by George W. Lennon and Michael W. Bertics, for Plaintiff-Appellee.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Paul C. Lawrence and M. Duane Jones, for Defendant-Appellants.

INMAN, Judge.

A defendant may not argue on appeal that the North Carolina Industrial Commission lacks the authority to award fees for attorneys to be paid out of an award of medical compensation without preserving the issue before the Commission. An award of attendant care compensation will be upheld where the Commission's findings of fact are supported by competent evidence and the findings of fact support the Commission's conclusion of law that the attendant care services are reasonable and necessary.

Carolina Holdings, Wolseley Management, and ACE USA/ESIS ("Defendants") appeal from an Opinion and Award of the Full Commission of the North Carolina Industrial Commission (the "Commission"), wherein the Commission awarded retroactive and ongoing medical compensation for attendant care services for Christopher S. Reed ("Mr. Reed" or "Plaintiff"), and twenty-five percent of the retroactive medical compensation to be paid to Mr. Reed's attorney as an attorney's fee.

Defendants contend the Commission erred in awarding attendant care services and exceeded its authority in granting an attorney's fee award to be deducted from the retroactive award of attendant care. Mr. Reed filed a motion to dismiss Defendants' appeal for failure to properly preserve their challenge to the attorney's fee award below. After careful review, we affirm the Commission's award of attendant care services and grant Mr. Reed's motion to dismiss Defendant's appeal as to the award of attorney's fees.

Factual and Procedural History

Mr. Reed began working with Defendants on 20 May 1998. On 26 June 1998, Mr. Reed sustained a traumatic brain injury along with

REED v. CAROLINA HOLDINGS

[251 N.C. App. 782 (2017)]

injuries to his shoulder, back, and other body parts when a stack of building supplies collapsed on top of him. Defendants accepted liability for Mr. Reed's injuries and provided compensation for Mr. Reed's lost income and medical treatment resulting from the injury. Psychological and psychiatric evaluations over the next decade indicated that Mr. Reed's cognitive and emotional condition continued to deteriorate and that Mr. Reed was not reliably taking prescribed medication. In 2010, a forensic psychiatrist diagnosed Mr. Reed with a cognitive disorder, obsessive compulsive disorder, and a mood disorder.

On 18 March 2011, Mr. Reed filed a Form 33 requesting that the Commission hear his claim for attendant care compensation. Following a hearing, Deputy Commissioner George R. Hall, III entered an Opinion and Award requiring Defendants to pay Mr. Reed's mother ("Mrs. Reed") ten dollars per hour for twenty-four hours per day, seven days per week from 27 June 1998 through the date of the Opinion and Award and continuing, and allowing Mr. Reed's counsel to deduct twenty-five percent of the back due attendant care owed from the award as a reasonable attorney's fee. The Deputy Commissioner denied Mr. Reed's counsel's request to deduct twenty-five percent of the compensation for future attendant care as an attorney's fee.

Defendants appealed the award to the Full North Carolina Industrial Commission pursuant to N.C. Gen. Stat. § 97-85 and Rule 701 of the North Carolina Industrial Commission. Mr. Reed appealed to the Full Commission pursuant to N.C. Gen. Stat. § 97-90(c) that portion of the award denying the claim for attorney's fee to be deducted from future medical compensation.

On appeal from the Deputy Commissioner's decision, the Commission received additional evidence with respect to Mr. Reed's attendant care claim. Defendants offered surveillance evidence conducted from July 2012 through November 2012 in support of their contention that Mr. Reed does not require attendant care. This evidence included testimony by three private investigators regarding Mr. Reed's ability to perform daily activities, his physical limitations, and his regular residence. Mr. Reed introduced additional deposition testimony by himself, his mother, his friend Jessica Lloyd, and two of his doctors.

After reviewing the additional evidence, the Commission entered its Opinion and Award on 17 April 2015. The Commission made extensive findings of fact and conclusions of law and issued the following award:

1. Plaintiff's request for compensation for attendant care services provided to him from March 18, 2007 to March 17,

REED v. CAROLINA HOLDINGS

[251 N.C. App. 782 (2017)]

2011 is DENIED. Plaintiff's request for attendant care services provided to him beginning March 18, 2011 to the present and continuing is GRANTED. From March 18, 2011, through the present and continuing, Defendants shall pay Plaintiff's mother, Mrs. Reed, for 8 hours per day, 7 days per week of attendant care services she has provided and continues to provide to Plaintiff at a reasonable rate agreed upon by the parties. The amounts awarded are subject to the attorneys' fee set forth below.

2. As a reasonable attorney's fee, Plaintiff's counsel is entitled to be paid 25% of all accrued retroactive attendant care compensation herein. Defendants shall deduct 25% from the accrued amount and pay it directly to Plaintiff's counsel as a reasonable attorney's fee. Plaintiff's counsel request for 25% of future attendant care payments is DENIED. However, Plaintiff's counsel may seek additional compensation if future attendant care issues arise.

Following the Commission's Opinion and Award, the parties respectively filed a series of pleadings in three forums:

- On 30 April 2015, Mr. Reed filed with the Wake County Superior Court a notice of appeal from the Opinion and Award pursuant N.C. Gen. Stat. § 97-90(c) regarding the Commission's denial of his request for attorney's fees to be deducted from future attendant care compensation.
- On 5 May 2015, Defendants filed with the Commission a Motion for Reconsideration arguing—apparently for the first time—that the Commission had erred in awarding any attorney's fees from medical compensation awarded to Mr. Reed. The Motion cited the same legal authorities that would later be raised in Defendants' appeal to this Court. The record does not reflect that Defendants raised this issue or presented these legal arguments previously before either Deputy Commissioner Hall or the Commission.¹

1. The Motion also asked the Commission to amend the Opinion and Award to require Mr. Reed's mother to report her attendant care earnings to the government and to be responsible for paying all taxes applicable to the earnings.

REED v. CAROLINA HOLDINGS

[251 N.C. App. 782 (2017)]

- On 13 May 2015, Defendants filed with this Court a notice of appeal from the Commission's Opinion and Award.
- Two days later, on 15 May 2015, Defendants filed with the Wake County Superior Court a pleading captioned "Defendants' Response to Plaintiff's Notice of Appeal of Award of Attorney's Fees," asserting the same argument Defendants presented to the Commission in their Motion for Reconsideration. Defendants asked the Wake County Superior Court to reverse the Commission's award of attorney's fees to Mr. Reed "or at the very least allow for this matter to be decided by the Full Commission" based on Defendants' then pending Motion for Reconsideration.²
- On 2 June 2015, the Commission filed an Order concluding that Defendants' appeal to the Wake County Superior Court deprived the Commission of jurisdiction to reconsider its Opinion and Award.
- On 10 June 2015, Defendants filed a Motion to Intervene in the Wake County Superior Court proceeding initiated by Mr. Reed.
- On 23 June 2015, the Superior Court entered an order allowing Defendants to intervene in that proceeding, but holding the case in abeyance pending the outcome of Defendants' appeal to this Court.

On appeal before this Court, Defendants challenge the Commission's findings of fact related to Mr. Reed's ability to function independently, his need for around the clock monitoring, the medical necessity of his attendant care services, and the weight given to Defendants' surveillance evidence. Defendants also challenge the Commission's authority to award attorney's fees pursuant N.C. Gen. Stat. § 97-90(c) to be deducted from an award of attendant care compensation. Mr. Reed has filed a motion to dismiss Defendants' appeal as to the issue of attorney's fees.

2. Defendants represented to the Superior Court that their Motion for Reconsideration concerned the Commission's "decision with regards to Award No. 1." However, Award No. 1 addressed attendant care compensation, not attorney's fees.

REED v. CAROLINA HOLDINGS

[251 N.C. App. 782 (2017)]

Plaintiff's Motion to Dismiss Defendants' Appeal

[1] Mr. Reed's motion to dismiss asserts (1) that Defendants lack standing to challenge an award of attorney's fees; (2) that our Court lacks subject matter jurisdiction regarding attorney's fees because the Superior Court has exclusive jurisdiction regarding such fees; and (3) that our Court lacks subject matter jurisdiction because Defendants failed to preserve their argument regarding the Commission's authority to grant attorney's fee awards from medical compensation. After careful review, we agree that Defendants failed to preserve their argument regarding the Commission's authority to award attorney's fees to be deducted from attendant care compensation. We therefore dismiss Defendants' appeal with respect to that issue.

Rule 701 of the North Carolina Industrial Commission states:

(2) After receipt of notice of appeal, the Industrial Commission will supply to the appellant a Form 44 Application for Review upon which appellant must state the grounds for appeal. The grounds must be stated with particularity, including the specific errors allegedly committed by the Commissioner or Deputy Commissioner and, when applicable, the pages in the transcript on which the alleged errors are recorded.

(3) Particular grounds for appeal not set forth in the application for review shall be deemed abandoned, and argument thereon shall not be heard before the Full Commission.

Workers' Comp. R. of N.C. Indus. Comm'n 701, 2011 Ann. R. (N.C.) 1070-71. It is well established that "the portion of Rule 701 requiring appellant to state with particularity the grounds for appeal may not be waived by the Full Commission." *Roberts v. Wal-Mart, Inc.*, 173 N.C. App. 740, 744, 619 S.E.2d 907, 910 (2005). "[T]he penalty for non-compliance with the particularity requirement is waiver of the grounds, and where no grounds are stated, the appeal is abandoned." *Wade v. Carolina Brush Mfg. Co.*, 187 N.C. App. 245, 249, 652 S.E.2d 713, 715-16 (2007) (citations omitted). Applying established precedent to the record in this case, we conclude that although Defendants preserved their objection to the award of attorney's fees as a derivative of their objection to the award of attendant care compensation, Defendants failed to preserve a challenge to the Commission's authority to award attorney's fees deducted from such compensation. There is no indication in the record that this issue was raised at all before the Commission prior to the Opinion and

REED v. CAROLINA HOLDINGS

[251 N.C. App. 782 (2017)]

Award from which this appeal arises. Defendants pleaded only a generalized assignment of error regarding the attorney's fee award. There is no indication in the record that Defendants stated in any form or fashion the basis of their objection to the award of attorney's fees with sufficient particularity to give Mr. Reed or the Commission notice of a legal issue to be addressed on appeal from the Deputy Commissioner's decision.

Defendants argue they preserved the issue of attorney's fees on appeal to the Full Commission because the fifteenth—and last—assignment of error in their Form 44 referred to the Deputy Commissioner's award of attorney's fees. Assignment of Error 15 stated:

For all the reasons stated above, Award #2 is contrary to law, is not supported by the findings of fact and is contrary to the competent and credible evidence of record.

Although neither the word "attorney" nor the word "fee" is mentioned in the assignment of error, Paragraph No. 2 under the heading "Award" in the Deputy Commissioner's Opinion and Award provides for the award of attorney's fees. Therefore, the fifteenth assignment of error could be said to identify the attorney's fee award in general. As for the basis of the objection, however, the assignment simply states it is "[f]or all the reasons stated above" The reasons stated above, *i.e.*, assignments of error 1 through 14, challenge factual findings and conclusions of law related to whether Mr. Reed requires attendant care and whether Mr. Reed and his mother are entitled to reimbursement for attendant care services. So Defendants' objection to the award of attorney's fees appears to be based solely on their objections to the award of attendant care compensation. None of the prior assignments challenge the Commission's authority to award attorney's fees to be deducted from attendant care compensation.

The fifteenth assignment of error is similar to the assignment of error that this Court found insufficient to preserve a challenge to a deputy commissioner's award of attorney's fees in *Adcox v. Clarkson Bros. Constr. Co.*, 236 N.C. App. 248, 254, 773 S.E.2d 511, 516 (2015). That assignment of error challenged an award

on the grounds that it is based upon Findings of Fact and Conclusions of Law which are erroneous, not supported by competent evidence or evidence of record, and are contrary to the competent evidence of record, and are contrary to law: Award Nos. 1-3.

Id.

REED v. CAROLINA HOLDINGS

[251 N.C. App. 782 (2017)]

Although the assignment of error in *Adcox* mentioned the paragraph number corresponding to attorney's fees in the deputy commissioner's award, this Court held that the generalized assignment "covers everything and touches nothing." *Id.* at 255, 773 S.E.2d at 516 (citation and quotation marks omitted). The assignment did "not state the basis of any objection to the attorneys' fee award with sufficient particularity to give [the] plaintiff notice of the legal issues that would be addressed by the Full Commission such that he could adequately prepare a response." *Id.* (citation omitted). The Court in *Adcox* compared the insufficient assignment of error there to the appellant's assignment of error in *Walker v. Walker*, 174 N.C. App. 778, 782, 624 S.E.2d 639, 642 (2005). *Adcox*, 236 N.C. App. at 255, 773 S.E.2d at 516. The assignment of error in *Walker*, analogous to that in *Adcox* and in this case, asserted that several rulings of the trial court were "erroneous as a matter of law." *Walker*, 174 N.C. App. at 782, 624 S.E.2d at 642. This Court held that the assertion "that a given finding, conclusion, or ruling was 'erroneous as a matter of law' completely fails to *identify* the issues actually briefed on appeal." *Id.* (emphasis in original).

Defendants contend that they did properly raise sufficient grounds in their brief to the Commission to preserve their challenge to the Commission's authority to grant attorney's fees from an award of attendant care compensation. They rely on this Court's decision in *Cooper v. BHT Enters.*, 195 N.C. App. 363, 672 S.E.2d 748 (2009). In *Cooper*, the plaintiff asserted that the defendant's failure to file a Form 44 constituted abandonment of the grounds for the defendant's appeal from a deputy commissioner's decision to the Commission, and therefore the Commission erred in hearing the appeal. *Id.* at 368, 672 S.E.2d at 753. But this Court concluded that "both this Court and the plain language of the Industrial Commission's rules have recognized the Commission's discretion to waive the filing requirement of an appellant's Form 44 where the appealing party has stated its grounds for appeal with particularity in a brief or other document filed with the Full Commission," and overruled the plaintiff's argument. *Id.* at 369, 672 S.E.2d at 753-54. Thus, the Court in *Cooper* refused to put form over substance and affirmed the Commission's discretion to hear an issue that had been stated with particularity.

Here, unlike in *Cooper*, we find in the record no substance that can mend the insufficiency of Defendants' Form 44. Although Defendants contend in response to the Motion to Dismiss that they stated their challenge to the Commission's authority to award attorney's fees in their brief to the Commission on appeal from the Deputy Commissioner's

REED v. CAROLINA HOLDINGS

[251 N.C. App. 782 (2017)]

decision, they did not include the referenced brief in the record. Nor did Defendants seek to supplement the record with the referenced brief in response to the Motion to Dismiss. We have searched the record and find no such pleading filed with the Commission by Defendants regarding attorney's fees other than the Defendants' Motion for Reconsideration, which Defendants filed *after* the Commission had issued its Opinion and Award. Like the defendants in *Adcox*, Defendants do not point to any support in the record indicating that they raised this issue in their appeal from the Deputy Commissioner's decision. Nor do Defendants point to any indication in the record that the Commission sought to exercise its discretion to determine this issue. As discussed further *infra*, the only pleadings in the record regarding this issue were filed *after* the Commission had issued its Opinion and Award. Accordingly, we hold Defendants abandoned their argument that the Commission lacked the authority under the Act to grant an award of attorney's fees out of an award of attendant care compensation, and dismiss Defendants' appeal as to this issue.

The dissenting opinion asserts that we decline to address the issue of attorney's fees "solely because Defendants did not include a copy of their supporting legal brief to the Full Commission in the long settled record on appeal." To be clear, we hold that because there is no indication in the record that Defendants raised the issue before the Commission and there is no indication that the Commission addressed the issue, we have no jurisdiction to review it. This is not a case of a technicality foreclosing review based on an inadvertent omission in the record. Not only did Defendants not include in the record the brief they now claim preserved the issue, but they failed to supplement the record with the referenced brief when challenged to point to any portion of the record preserving the issue for review. Indeed, the record reflects only that after the Commission issued its Opinion and Award, Defendants filed a Motion for Reconsideration regarding the attorney's fee issue. That pleading tellingly does not refer to Defendants having raised the issue in any prior brief or argument to the Commission.

The dissent seeks to justify a different result by relying on inapposite case authority. In *Tucker v. Workable Company*, 129 N.C. App. 695, 701, 501 S.E.2d 360, 365 (1998) the parties had mistakenly stipulated before the Commission that the worker's weekly salary was \$659.70 per week although it was actually \$157.80 per week. The employer discovered the error after the Commission's Opinion and Award and sought reconsideration, which the Commission denied. *Id.* This Court reversed the denial and remanded the matter to the Commission. *Id.*

REED v. CAROLINA HOLDINGS

[251 N.C. App. 782 (2017)]

The award of attorney's fees from attendant care compensation does not arise from a factual mistake or a legal error that has previously been recognized by this Court or the Supreme Court of North Carolina. It is an issue of first impression requiring careful interpretation of the Workers' Compensation Act. We cannot circumvent the limits of our jurisdiction to address a watershed issue with broad reaching consequences.

Because we dismiss Defendants' appeal regarding the Commission's authority to award attorney's fees from attendant care compensation based on their abandonment of the issue before the Commission, we need not address the other arguments presented by Plaintiff in his Motion to Dismiss.

Award of Attendant Care Compensation

[2] Defendants assign error to the Commission's award of attendant care compensation by asserting there was insufficient evidence to support the Commission's findings of fact and therefore, the findings of fact do not support the Commission's conclusions of law. We disagree.

A. Standard of Review

When reviewing an award from the Commission, our review is limited to determining: (1) whether the findings of fact are supported by competent evidence, and (2) whether those findings support the Commission's conclusions of law. *Chambers v. Transit Mgmt.*, 360 N.C. 609, 611, 636 S.E.2d 553, 555 (2006). Unchallenged findings of fact "are 'presumed to be supported by competent evidence' and are, thus 'conclusively established . . .'" *Chaisson v. Simpson*, 195 N.C. App. 463, 470, 673 S.E.2d 149, 156 (2009) (quoting *Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118 (2003)). "The Commission's conclusions of law are reviewed *de novo*." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004) (citation omitted). "An opinion and award of the Industrial Commission will only be disturbed upon the basis of a patent legal error." *Roberts v. Burlington Indus., Inc.*, 321 N.C. 350, 354, 364 S.E.2d 417, 420 (1988).

B. Analysis

In North Carolina, the Workers' Compensation Act provides employees compensation for injuries sustained within the course and scope of employment, charging employers with the responsibility to cover costs such as medical compensation. N.C. Gen. Stat. § 97-1 *et seq.* (2015). The Act defines medical compensation as:

REED v. CAROLINA HOLDINGS

[251 N.C. App. 782 (2017)]

medical, surgical, hospital, nursing, and rehabilitative services, including, but not limited to, attendant care services prescribed by a health care provider authorized by the employer or subsequently by the Commission, vocational rehabilitation, and medicines, sick travel, and other treatment, including medical and surgical supplies, as may reasonable be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability; and any original artificial members as may reasonably be necessary at the end of the healing period and the replacement of such artificial members when reasonably necessitated by ordinary use or medical circumstances.

N.C. Gen. Stat. § 97-2(19).³ To award medical compensation, and specifically attendant care services, the Commission must make findings from competent evidence to support its conclusion that the attendant care services were reasonable and necessary as a result of the employee's injury. See *Shackleton v. Southern Flooring & Acoustical Co.*, 211 N.C. App. 233, 245, 712 S.E.2d 289, 297 (2011). Such competent evidence includes, but is not limited to: "a prescription or report of a healthcare provider; the testimony or a statement of a physician, nurse, or life care planner; the testimony of the claimant or the claimant's family member; or the very nature of the injury." *Id.* at 250-51, 712 S.E.2d at 300.

Here, the Commission made the following findings of fact, which Defendants challenge, in support of its conclusion that Mr. Reed's attendant care services were reasonable and necessary:

6. Dr. Prakken [Mr. Reed's physician] also opined that Plaintiff is not able to function independently. Plaintiff cannot effectively shop for himself, pay his own bills, or set up his own appointments because of his obsessive compulsive symptoms and his high level of anxiety. He is inconsistent with his activities of daily living. Dr. Prakken compared Plaintiff's levels of function with that of an 8-year-old child and testified that Plaintiff could

3. The General Assembly amended the Act in 2011 to include attendant care services within the definition of medical compensation. 2011 N.C. Sess. Laws ch. 287, § 2. This definition was not in effect at the time this claim was filed; however, the North Carolina Supreme Court has previously included attendant care services within the statute's "other treatment." *Mehaffey v. Burger King*, 367 N.C. 120, 125, 749 S.E.2d 252, 255 (2013). Neither party disputes attendant care services as being other than medical compensation.

REED v. CAROLINA HOLDINGS

[251 N.C. App. 782 (2017)]

not function outside an institution without his mother, Elizabeth Reed.

7. Since Plaintiff's injury, Mrs. Reed has been caring for him. The attendant care services Mrs. Reed provides for Plaintiff include shopping for him, cooking, transporting and attending with Plaintiff most medical visits, cleaning, providing money management, scheduling medical appointments, reminding him to bathe and attend to personal hygiene, making sure he takes his prescription medications, monitoring his status 24 hours per day, seven days per week since Plaintiff's behavior and sleeping habits are unpredictable, calming him down during an anxiety attack or other crisis. Mrs. Reed has not worked in the competitive labor market since Plaintiff's accident.

8. Prior to his injury, Plaintiff was a fully functional college student who was able to function independently. There is no evidence that he would have become wholly dependent on the care of his mother, but for the compensable accident at work and resulting traumatic brain injury.

...

33. Dr. Prakken was deposed for a second time after the reopening of the record in this matter. Dr. Prakken is board certified in psychiatry and pain management. He reviewed the surveillance taken by Defendants and testified that the surveillance evidence did not show Plaintiff's mental or emotional states and that Plaintiff's impairment is not the kind of impairment you can easily see in a snapshot. Dr. Prakken testified that his opinion regarding Plaintiff's need for attendant care has not changed and that Plaintiff need around the clock passive medical monitoring. Dr. Prakken explained that Plaintiff was one of the most anxious and ill patients he has had in his practice and that Plaintiff required attendant care because he has grave difficulties from his traumatic brain injury. Dr. Prakken testified that Plaintiff's decision-making process is so concrete and centered on what he feels at that moment that it leaves him very impulsive and he doesn't have the capacity to modulate those feelings and understand that he may feel differently later. Dr. Prakken further testified

REED v. CAROLINA HOLDINGS

[251 N.C. App. 782 (2017)]

that Plaintiff's actions and his choices change moment to moment like his feelings do and that is something that requires management and he cannot live independently for even a moderate amount of time. For example, Dr. Prakken testified that living independently would leave Plaintiff impulsive about potential medication use and he would not be able to consistently pay bills, feed himself, or take care of his activities of daily living.

34. As a part of his anxiety, Plaintiff also suffers from obsessive compulsive disorder which according to Dr. Prakken is like a "double whammy, where he's not only in this very, very short decision-making loop based solely on how he feels, but how he feels is just profused with anxiety." Dr. Prakken testified that if Plaintiff did not have attendant care he would need to be institutionalized and that Plaintiff has difficulty getting out of his internal anxiety state long enough to attend to the social needs of others and to efficiently be able to hold a job. With respect to Plaintiff's relationship with Ms. Lloyd, Dr. Prakken testified that Plaintiff longs to be normal and has a tendency to attach to people in a profound way if they show caring or liking for him. Dr. Prakken Believed that Ms. Lloyd was likely giving Mrs. Reed some extended care support.

...

38. Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that the surveillance evidence submitted by Defendants does not show any activity in excess of Plaintiff's physical limitations, does not show Plaintiff performing any work activity and only showed Plaintiff performing very limited activities of daily living. The Full Commission gives great weight to the opinion testimony of Dr. Prakken and finds as fact that the surveillance videos and reports do not show Plaintiff's mental and emotional state.

...

45. Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that Mrs. Reed has provided reasonable and medically necessary, attendant care services for Plaintiff for which she should be compensated. Plaintiff needs 24 hours per day, 7 days

REED v. CAROLINA HOLDINGS

[251 N.C. App. 782 (2017)]

per week attendant care services. Plaintiff has needed this level of care since his release from the hospital following his injury. As a result of his June 26, 1998 injury by accident, Plaintiff sustained severe injuries including fractures of the jaw, broken teeth, injuries to his head, shoulder, back and other body parts, and a traumatic brain injury. Plaintiff was hospitalized and underwent numerous surgeries for his injuries. Upon his release from the hospital, Plaintiff was no longer able to live by himself and he moved into his parents' house. Mrs. Reed testified that upon his release from the hospital, Plaintiff was no longer able to function independently and she had to "pretty much keep an eye on-on him." Defendants did not offer Plaintiff any attendant care services upon his release from the hospital and Mrs. Reed testified that she began providing Plaintiff attendant care services for his activities of daily living such as cooking, cleaning, and shopping for Plaintiff, transporting Plaintiff to his medical visits, and reminding Plaintiff to bathe and take his medication and assisting him with his physical and emotional needs. There are both active and passive elements to the medically necessary attendant care provided by Mrs. Reed. The passive elements of care include general monitoring of Plaintiff's medical and emotional state to some extent throughout each day and the fact that Mrs. Reed is "on-call" to help Plaintiff 24 hours per day 7 days per week. Even when Plaintiff is sleeping, which is sporadic and sometimes not at all on some nights, Mrs. Reed is available to assist Plaintiff. However, since Plaintiff is able to actually perform his own basic activities of daily living with prompting, spends long periods of time alone where only monitoring of him is required and asserts his desire to be independent by leaving home and going places on his own, the Full Commission finds that Mrs. Reed actually spends an average of 8 hours per day providing attendant care services to Plaintiff, even though he requires constant monitoring. The Full Commission further finds that Ms. Lloyd assists Plaintiff's mother with the passive monitoring Plaintiff requires when Plaintiff is visiting her.

Based on these findings of fact, the Commission made and entered the following conclusion of law and award:

REED v. CAROLINA HOLDINGS

[251 N.C. App. 782 (2017)]

3. With respect to attendant care services provided to Plaintiff from March 18, 2007 to March 17, 2011, Defendants did not have actual or written notice that Plaintiff needed attendant care services as a result of conditions related to his compensable injury and Plaintiff did not seek approval of those attendant care services until March 18, 2011 when he filed a Form 33. Plaintiff's request for attendant care services during the period from March 18, 2007 to March 17, 2011 was not sought within a reasonable time. N.C. Gen. Stat. §§ 97-2(19), 97-25; *Mehaffey v. Burger King*, __ N.C. __, 749 S.E.2d 252 (2013). However, Defendants had written notice through the Form 33 filed by Plaintiff on March 18, 2011 that Plaintiff needed attendant care services as a result of conditions related to his compensable injury. Under the circumstances of this case, the Full Commission concludes that Plaintiff sought approval from the Industrial Commission for attendant care services that were being provided by Mrs. Reed and that it is reasonable to retroactively compensate Mrs. Reed for attendant care services provided to Plaintiff from the date Defendants had actual notice that these services were being provided and Plaintiff was seeking reimbursement. *Schofield v. Great Atl. & Pac. Tea Co.*, 299 N.C. 582, 593, 264 S.E.2d 56, 63 (1980). As a result of his compensable injury, Plaintiff is entitled to attendant care services in the amount of 8 hours per day, 7 days a week. Plaintiff is entitled to retroactive compensation for the attendant care services provided by Mrs. Reed for 8 hours per day, 7 days per week, from March 18, 2011 and continuing to through the present. N.C. Gen. Stat. §§ 97-2(19), 97-25; *Mehaffey v. Burger King*, __ N.C. __, 749 S.E.2d 252 (2013).

...

1. Plaintiff's request for compensation for attendant care services provided to him from March 18, 2007 to March 17, 2011 is DENIED. Plaintiff's request for attendant care services provided to him beginning March 18, 2011 to the present and continuing is GRANTED. From March 18, 2011, through the present and continuing, Defendants shall pay Plaintiff's mother, Mrs. Reed, for 8 hours per day, 7 days per week of attendant care services she has provided and continues to provide to Plaintiff at a reasonable

REED v. CAROLINA HOLDINGS

[251 N.C. App. 782 (2017)]

rate agreed upon by the parties. The amounts awarded are subject to the attorneys' fee set forth below.

If these findings of fact are supported by competent evidence, they are conclusive on appeal, "even if there is evidence to support a contrary finding." *Kelly v. Duke University*, 190 N.C. App. 733, 738, 661 S.E.2d 745, 748 (2008) (citing *Morrison v. Burlington Industries*, 304 N.C. 1, 6, 282 S.E.2d 458, 463 (1981)). We consider the following testimony by Dr. Steven Prakken:

Q. To your knowledge, has Christophor [sic] ever moved to any t -- any place other than the home of his mother, Elizabeth?

A. No, not to my knowledge.

Q. And, to your knowledge, has he continued to require the attendant care you have prescribed and testified as medically necessary in his case?

A. Yes, his condition has not changed.

Q. And, in your opinion, is that attendant care more likely than not going to be required in the future by his mother or friends and family members regardless of where he may be?

A. Attendant -- Attendant care will be needed.

...

In my clinical experience, [Chris] is one of the most anxious and ill people that I have in my practice.

...

His actions, and his choices, and his decisions change moment-to-moment like his feelings do. That is something that requires management. That is something that cannot live independently for an extern -- for even a moderate amount of time, certainly not for an extended period of time.

It will leave him impulsive about potentially medication use. It will leave him impulsive about taking a trip that he can't survive doing, like some f -- you know, f -- a thousand mile drive to somewhere that he suddenly has kind of a sudden passion to go do. He won't be able to be

REED v. CAROLINA HOLDINGS

[251 N.C. App. 782 (2017)]

consistent about paying bills, or feeding himself, or taking care of his activities of daily living consistently.

...

Obsessive compulsive disorder, which everybody is diagnosing him with, is an anxiety spectrum illness[.]

...

And, so, that's -- so, him, it's kind of a double whammy where he's not only in this very, very short decision-making loop based solely on how he feels, but how he feels is just perfused with anxiety. And that combination just makes his life quite miserable.

And it's not something that he's going to be able to do -- sorry -- his -- his life is not something he's going to be able to manage or handle on his own for any -- even mildly extended period of time.

Q. In your previous deposition, you indicated if he did not have attendant care, that he would probably have to be institutionalized or in some type of group facility. Is that still your opinion?

A. Clearly. . . .

...

Q. And would it be helpful to Chris to visit friends in his own age group, such as Jessica Lloyd?

A. Yes, it would be helpful for him to -- to actually visit with any age group. And if it happens to be somebody in his own age group, that's even better, yes.

...

So, [Ms. Lloyd], to me, is most likely giving the mom some attendant care support, so she can actually -- mom can have a day or an ert -- emergency, or a -- a night out without Chris, with somebody. I mean -- I mean, I'm sure she just goes nuts with him as much of the time -- with -- with -- with -- with the amount of time she has to spend with him.

...

REED v. CAROLINA HOLDINGS

[251 N.C. App. 782 (2017)]

Q. And from your familiarity with the surveillance evidence, just generally, would surveillance evidence show his mental and emotional status in any way?

A. It would not.

...

Q. And if the surveillance evidence showed many days when no activity was observed, would that be consistent with Chris's condition?

A. Certainly.

In addition to the deposition of Dr. Prakken, the Commission heard testimony from Mr. Reed's mother, Mrs. Elizabeth Reed. The following excerpts of her testimony are relevant to our review:

Q. The – can you tell us what Chris' condition was before his admittedly compensable injury?

A. Yes, Chris was perfectly normal with no disabilities. He had graduated from high school. He had graduated from Lewis College and he was a student at Western Carolina University and he came home for a summer job and that's when the doors fell on him.

...

Q. Have you taken him to most of these medical appointments?

A. Yes, sir. I have.

...

Q. And can you tell us what your role has been in this process since the injury in June of 1998?

A. . . . I tried to take care of him the best that I could. . . . be there to – to monitor him, to sit at the hospital, to sit at the doctor's offices, prepare whatever food we needed to prepare for him I realized after the accident that he was no longer able to take care of any money that he had . . . we have to pretty much keep an eye on – on him because of the depression We have had case managers on his case before and communicating with them, communicating with the doctors, dispensing his medications, just doing what a parent would do for their child.

REED v. CAROLINA HOLDINGS

[251 N.C. App. 782 (2017)]

...

Q. Can you tell us from your own observations what problems, if any, he has with – with sleeping and resting?

A. He has difficulty with sleeping. . . .

...

Q. Does he need help shopping?

A. He does. . . .

...

Q. Is he able to cook for himself?

A. Well, he used to cook a lot for himself before the accident. He, like I said, he lived independently. . . . [A]fter the accident we thought we could resume letting him take care of himself which that's what I would have preferred but he would forget and leave the stove on. So, he is not allowed to use the stove. . . .

Q. So, do you do most of the cooking?

A. I do.

...

Q. Does he need reminders about bathing and shaving and things like that?

A. He does. . . .

...

Q. And is the need for monitoring somethings that's present twenty-four hours a day, seven days a week?

...

A. Yes . . .

The testimony by Dr. Prakken and Mrs. Reed is competent evidence that supports the Commission's findings of fact challenged by Defendants. Dr. Prakken's testimony supports the Commission's finding that attendant care services are medically necessary for Mr. Reed. Mrs. Reed's testimony describing the attendant care she provides to Mr. Reed to help him with hygiene, shopping, cooking, taking medications, and managing his finances supports the Commission's finding that the attendant care services she provides are reasonable.

REED v. CAROLINA HOLDINGS

[251 N.C. App. 782 (2017)]

While there may be additional contrary evidence in the record, it is the Commission that “is the sole judge of the credibility of the witnesses and the weight to be given their testimony.” *Adam v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)). As such, we conclude that competent evidence supports the Commission’s findings of fact.

Because we hold the Commission’s findings of fact are supported by competent evidence, they are conclusive on appeal. *Id.* at 681, 509 S.E.2d at 414 (citing *Gallimore v. Marilyn’s Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977)). The Commission’s findings establish that while Mr. Reed requires attendant care services twenty-four hours per day, seven days per week, these services are both “active and passive.” The findings further establish that Mrs. Reed is merely “on-call” twenty-four hours per day, seven days per week, as opposed to actively monitoring Mr. Reed twenty-four hours per day, seven days per week. This in turn, supports the Commission’s conclusion of law that Mr. Reed’s attendant care compensation for Mrs. Reed is only reasonable and necessary for eight hours per day, seven days per week.

We conclude that the Commission’s findings of fact are supported by competent evidence and that these findings support its conclusions of law. Accordingly, we affirm the Commission’s award of attendant care compensation to Mr. Reed.

Conclusion

For the foregoing reasons, we dismiss Defendants’ appeal of the Commission’s award of attorney’s fees and affirm the Commission’s award of attendant care.

DISMISSED IN PART AND AFFIRMED IN PART.

Judge BRYANT concurs.

Judge TYSON concurs in part and dissents in part with separate opinion.

TYSON, Judge, concurring in part, dissenting in part.

Under our standard of review of appeals from the Industrial Commission, competent evidence supports the Commission’s award of attendant care to a third-party medical provider. The majority’s

REED v. CAROLINA HOLDINGS

[251 N.C. App. 782 (2017)]

conclusion to dismiss Defendants' appeal from the Commission's unauthorized award of attorney's fees from attendant care compensation, by asserting that issue was not properly before the Full Commission and is not properly before this Court is error. I respectfully dissent from that conclusion.

Whether the Industrial Commission has statutory or other authority to award attorney's fees from attendant care medical compensation due to a third-party medical provider was addressed before the Full Commission, was properly preserved by Defendants, and is properly before this Court. The Industrial Commission is without any lawful authority, and erred as a matter of law by ordering the payment of additional Plaintiff's attorney's fees from the award of attendant care medical compensation due and payable to a third-party medical provider.

I. Plaintiff's Motion to Dismiss Defendant's Appeal

More than six months after the record on appeal was settled and after Defendants' brief was filed, Plaintiff filed a motion to dismiss Defendants' appeal. Plaintiff argues this Court is without subject matter jurisdiction to review the attorney's fee award because: (1) Defendants failed to properly preserve their challenge to the attorney's fee award in their Form 44 before the Full Commission; (2) Defendants lack standing to contest the award of Plaintiff's attorney's fee; and (3) jurisdiction lies solely with the Wake County Superior Court, and Defendants have appealed to the improper tribunal. Defendants fully responded to and challenged each assertion in Plaintiff's motion.

The majority disposes of Defendants' appeal solely on the grounds Defendants failed to preserve their challenge to the attorney's fee award in their Form 44 before the Full Commission. I respectfully disagree to dismiss this issue which was fully addressed before the Commission, and also address the additional two threshold jurisdictional issues asserted in Plaintiff's motion to dismiss to reach the substantive merits of Defendants' appeal: the legality of awarding attorney's fees out of payments due for attendant care delivered by a third-party medical provider.

A. Preservation of the Issue Before the Industrial Commission

The majority's opinion partially dismisses Defendants' appeal, and holds Defendants failed to show before this Court that the issue of the award of attorney's fees was properly preserved before and addressed by the Full Commission. I disagree.

The majority notes, after giving sufficient notice of appeal from the Deputy Commissioner to the Full Commission, an appellant must

REED v. CAROLINA HOLDINGS

[251 N.C. App. 782 (2017)]

complete a Form 44 *Application for Review*, which is supplied by the Commission. The Form 44 should assert the grounds for the appeal “with particularity.” Workers’ Comp. R. of N.C. Indus. Comm’n 701(2), 2011 Ann. R. (N.C.) 1070. The appellant is required to file and serve the completed Form 44 and an accompanying brief within the specified time limitations “unless the Industrial Commission, in its discretion, waives the use of the Form 44.” *Id.* Defendants clearly met all these requirements.

If an appellant fails to state “with particularity” the grounds for appeal, such grounds are “deemed abandoned and argument thereon shall not be heard before the Full Commission.” Workers’ Comp. R. of N.C. Indus. Comm’n 701(2)-(3), 2011 Ann. R. (N.C.) 1070. The appellant may “compl[y] with Rule 701(2)’s requirement to state the grounds for appeal with particularity by timely filing their brief after giving notice of their appeal to the Full Commission.” *Cooper v. BHT Enters.*, 195 N.C. App. 363, 368, 672 S.E.2d 748, 753 (2009).

The majority correctly recognizes our Court has refused to place “form over substance” with regard to the Rule 701 requirements. Plaintiff was and is clearly on notice of Defendants’ challenges to the award of attorney’s fees out of the challenged award of attendant care medical compensation. Defendants’ Form 44 clearly challenges the Deputy Commissioner’s “Award 2” as “contrary to law,” which award deals solely with attorney’s fees. Defendants also filed a motion for reconsideration in the Full Commission, which also deals specifically with attorney’s fees.

In *Tucker v. Workable Company*, 129 N.C. App. 695, 700, 501 S.E.2d 360, 365 (1998), the defendant argued the Commission had erred by failing to modify the amount of the plaintiff’s average weekly wage. The Full Commission determined the average weekly wage issue was not preserved and did not consider the issue. *Id.* at 700-701, 501 S.E.2d at 365.

This Court noted “that if findings of fact made by the Industrial Commission ‘are predicated on an erroneous view of the law or a misapplication of the law, they are not conclusive on appeal.’” *Id.* at 701, 501 S.E.2d at 365 (quoting *Radica v. Carolina Mills*, 113 N.C. App. 440, 446, 439 S.E.2d 185, 189 (1994)). Our Court concluded that while Rule 701 requires the appellant to state the grounds for appeal with particularity,

[t]his Court has held that when the matter is “appealed” to the full Commission pursuant to G.S. 97-85, it is the duty and responsibility of the full Commission to *decide all of the matters in controversy between the parties*. *Joyner v. Rocky Mount Mills*, 92 N.C. App. 478, 374 S.E.2d 610 (1998). In *Joyner*, we said, “[i]nsamuch as the Industrial

REED v. CAROLINA HOLDINGS

[251 N.C. App. 782 (2017)]

Commission decides claims without formal pleadings, it is the duty of the Commission to *consider every aspect of plaintiff's claim* whether before a hearing officer or on appeal to the full Commission." *Id.* at 482, 374 S.E.2d at 613.

Id. (quoting *Vieregge v. N.C. State University*, 105 N.C. App. 633, 638, 414 S.E.2d 771, 774 (1992), *disc. review denied*, 345 N.C. 354, 483 S.E.2d 192 (1997)) (emphasis original). In *Tucker*, this Court considered the issue of the plaintiff's average weekly wage, and held the Commission erred in its determination of the amount of the plaintiff's average weekly wage. *Id.* at 702, 501 S.E.2d at 365; *see also Hauser v. Advanced Plastiform, Inc.*, 133 N.C. App. 378, 388-89, 514 S.E.2d 545, 552 (1999) (relying upon the quoted language from *Tucker*, and holding the issue of attorney's fees was before the Full Commission, even though the plaintiff did not raise the issue in the Form 44).

The majority recognizes *Cooper's* controlling authority, but declines to address the issue of attorney's fees and grants Plaintiff's tardy motion to dismiss, because Defendants did not include a copy of their supporting legal brief to the Full Commission in the long-settled record on appeal.

The record on appeal was settled by the parties and filed in with this Court on 15 September 2015. Plaintiff's motion to dismiss was filed over six months later on 14 April 2016. Plaintiff does not show any prejudice and cannot argue he failed to receive adequate notice of Defendants' appeal from the issue of the award of attendant care medical compensation and the additional Plaintiff's attorney's fees to be paid therefrom. Adequate notice is "the underlying consideration behind the spirit of Rule 701." *Lowe v. Branson Auto.*, __ N.C. App. __, __, 771 S.E.2d 911, 919-20 (2015).

The Full Commission reduced the Deputy's award of attendant care, which also reduced any purported attorney's fee to be paid therefrom. Plaintiff does not challenge that the Commission clearly considered and ruled upon Defendants' arguments regarding the award of medical attendant care compensation payable to a third-party provider and Plaintiff's attorney's fee to be paid from those proceeds. The attorney's fee award was an inseparable part and parcel of the award of attendant care compensation, which was undoubtedly before the Full Commission and is properly before this Court now. The Commission's purported award of attorney's fees from attendant care compensation "is predicated on an erroneous view of the law or a misapplication of the law," and "is not conclusive on appeal." *Tucker*, 129 N.C. App. at 701, 501 S.E.2d at 365.

REED v. CAROLINA HOLDINGS

[251 N.C. App. 782 (2017)]

Like in *Tucker* and *Hauser*, “the opinion and award of the Full Commission indicates that the issue of attorneys’ fees was before the Commission.” *Hauser*, 133 N.C. App. at 388, 514 S.E.2d at 552. This issue was preserved and is properly before this Court. Plaintiff’s motion to dismiss is wholly without merit, and should be denied.

B. Standing to Contest the Award of Plaintiff’s Attorney’s Fees

Plaintiff’s motion to dismiss also argues Defendants have not suffered pecuniary loss from the award of attorney’s fees to be paid from proceeds of medical compensation, and have not suffered an injury to confer jurisdiction upon this Court. This issue is settled law.

This Court concluded in *Saunders v. ADP TotalSource Fi Xi, Inc.*, __ N.C. App. __, __, 791 S.E.2d 466, 472 (2016):

Having both the duty and right to direct medical care and treatment provided to their injured employee, Defendants have a continuing interest in the pool of resources available for medical care and benefits for their employees’ injuries and assuring the medical providers do not reduce care and are fully compensated for services they render to an injured employee. Defendants have shown their legal rights have been denied or directly and injuriously affected by the superior court’s purported . . . award of attorney’s fees from funds stipulated as medical compensation, and have standing to challenge that order before this Court.

(citations and quotation marks omitted).

Also, because Plaintiff’s additional attorney’s fees were ordered to be paid from the proceeds of the retroactive attendant care compensation awarded by the Commission and due a third-party medical provider, which Defendants clearly have standing to appeal and have, in fact, properly appealed, Defendants also have standing to appeal from any purported award of attorney’s fees associated with and to be deducted from those awarded attendant care proceeds. *See id.*

Defendants’ arguments against the overall compensation and the attorney’s fees include as a common thread: the contention that Plaintiff’s counsel and health care providers have directed his care and rehabilitation in such a manner to undermine his ability to rehabilitate, and creates for Plaintiff, his mother, and counsel an additional pecuniary interest in Plaintiff remaining in attendant care for the foreseeable future, never rehabilitating and returning to work. Defendants’ standing to dispute this issue and the resultant attorney’s fee claim before

REED v. CAROLINA HOLDINGS

[251 N.C. App. 782 (2017)]

the Commission would be rendered meaningless, without standing to appeal from the Commission's order.

Furthermore, the attorney's fee is part of the attendant care medical compensation awarded by the Commission, which Defendants, as parties before the Commission, clearly have standing to challenge on appeal and have correctly appealed to this Court. *Id.*; N.C. Gen. Stat. § 97-86 (2015). Plaintiff's argument is wholly without merit.

C. Proper Tribunal for Appeal

Plaintiff also argues this Court does not have subject matter jurisdiction, because the issue Defendants contest regarding the attorney's fees is within the sole jurisdiction of the superior court. The law is also settled on this issue.

The issue of whether attorney's fees may be deducted from the proceeds of an award of third-party attendant care medical compensation and paid directly to Plaintiff's attorney is properly before this Court. In *Saunders*, this Court stated:

[T]he superior court in its order apparently found facts and ruled far beyond an appellate review of the "reasonableness" of the attorney's fee, for legal services rendered to the injured worker by his attorney. The superior court purported to adjudicate a question of workers' compensation law, *i.e.*, whether the Commission may order an attorney's fee to be paid from the award of medical compensation. This determination is outside the scope of the superior court's appellate jurisdiction under N.C. Gen. Stat. § 97-90(c), and rests within the statutes governing the Industrial Commission, subject to appeal to this Court. N.C. Gen. Stat. § 97-91 (2015). Our Court has determined "medical compensation is solely in the realm of the Industrial Commission, and § 97-90(c) gives no authority to the superior court to adjust such an award under the guise of attorneys' fees. Doing so constitutes an improper invasion of the province of the Industrial Commission, and constitutes an abuse of discretion." *Palmer I*, 157 N.C. App. at 635, 579 S.E.2d at 908.

Saunders, __ N.C. App. at __, 791 S.E.2d at 476-77.

The appeal from the Industrial Commission's order, which adjudicated a question of worker's compensation law, is properly before this Court *de*

REED v. CAROLINA HOLDINGS

[251 N.C. App. 782 (2017)]

novo, and not the Wake County Superior Court for any “reasonableness” review. *Id.* Plaintiff’s motion and argument are wholly without merit.

II. Award of Attorney’s Fees

Defendants argue the Commission cannot award attorney’s fees under these facts, and erred as a matter of law by purporting to award Plaintiff’s attorney additional fees to be paid directly from the award of attendant care compensation payable to a third-party medical provider. I agree.

A. Standard of Review

The Commission’s award of attorney’s fees is a conclusion of law, which is reviewable by this Court *de novo*. *Grantham v. R.G. Barry Corp.*, 127 N.C. App. 529, 534, 491 S.E.2d 678, 681 (1997), *disc. review denied*, 347 N.C. 671, 500 S.E.2d 86 (1998).

B. Analysis

The Full Commission purported to award Plaintiff’s attorney a fee of twenty-five percent, to be paid directly from the proceeds of all retroactive attendant care medical compensation awarded to Ms. Reed from 18 March 2011 until 13 May 2015, the date of the Commission’s award. The Commission denied Plaintiff’s attorney’s request for twenty-five percent of future attendant care medical payments. Defendants were ordered to deduct twenty-five percent from the accrued retroactive proceeds awarded to a third-party medical provider, and to pay it directly to Plaintiff’s counsel. Defendant correctly asserts this attorney’s fee award by the Commission was ordered without any statutory basis, and is not authorized as a matter of law.

The employer is statutorily required to provide “medical compensation” as benefits to an injured employee. N.C. Gen. Stat. § 97-25 (2015). Medical compensation is defined as services “as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability.” N.C. Gen. Stat. § 97-2 (2015). “[An] employer’s right to direct medical treatment (including the right to select the treating physician) attaches once the employer accepts the claim as compensable.” *Kanipe v. Lane Upholstery*, 141 N.C. App. 620, 624, 540 S.E.2d 785, 788 (2000).

The Workers Compensation Act presumes the injured worker will heal, recover from the injuries for which he is receiving medical care, and will return to work. *Effingham v. Kroger Co.*, 149 N.C. App. 105, 114-15, 561 S.E.2d 287, 294 (2002) (“Temporary disability benefits are for

REED v. CAROLINA HOLDINGS

[251 N.C. App. 782 (2017)]

a limited period of time. There is a presumption that [the employee] will eventually recover and return to work. Therefore, the employee must make reasonable efforts to go back to work or obtain other employment.” (internal citation and quotation marks omitted)).

Here, Plaintiff was injured after a month on the job on 26 June 1998. Plaintiff retained counsel soon after the injury. On 18 March 2011, Plaintiff filed a Form 33 to request a hearing before the Commission, and alleged Defendants had failed to pay attendant care medical compensation to which he was entitled. Three months later, in June 2011, the General Assembly amended N.C. Gen. Stat. § 97-2, to include attendant care services within the definition of “medical compensation.”

N.C. Gen. Stat. § 97-2(19) (2015) specifically defines “medical compensation” to include “attendant care services prescribed by a health care provider authorized by the employer or subsequently by the Commission[.]” Prior to the statute’s amendment, and at the time Plaintiff’s claim for attendant care arose, the phrase “other treatment” set forth in N.C. Gen. Stat. § 97-2(19) had been interpreted to include attendant care medical services. *See Mehaffey v. Burger King*, 367 N.C. 120, 124-25, 749 S.E.2d 252, 255 (2013) (citing *Ruiz v. Belk Masonry Co.*, 148 N.C. App. 675, 681, 559 S.E.2d 249, 253-54, *appeal dismissed and disc. rev. denied*, 356 N.C. 166, 568 S.E.2d 610 (2002)). All parties stipulated during oral arguments and the majority correctly notes that payment for third-party provided “attendant care services” constitutes “medical compensation”.

1. *Palmer v. Jackson* (“*Palmer I*”)

Medical compensation paid by the employer for medical services previously rendered are payments and reimbursements to third-party providers. These payments are neither entitlements nor indemnity wages or benefits payable to the injured worker or his attorney. Payments for medical compensation are not subject to any offsets from those proceeds to pay Plaintiff’s attorney additional fees under the Worker’s Compensation Act. *Palmer v. Jackson*, 157 N.C. App. 625, 579 S.E.2d 901 (2003) (“*Palmer I*”).

In *Palmer I*, the injured employee had incurred substantial medical bills owed to the University of North Carolina Hospitals and University of North Carolina Physicians and Associates. *Id.* at 626, 579 S.E.2d at 903. Plaintiff’s attorneys “exert[ed] much time, money and expertise,” to prove to the Commission that that the plaintiff’s heatstroke was compensable as an occupational disease. *Id.* As part of the award, the

REED v. CAROLINA HOLDINGS

[251 N.C. App. 782 (2017)]

defendant-employer was ordered to pay for past and future medical expenses incurred by the plaintiff. *Id.* at 627, 579 S.E.2d at 903.

The superior court in *Palmer I* awarded twenty-five percent of both the wage indemnity and the medical compensation proceeds, either already paid or still outstanding, to be paid to plaintiff's attorneys. *Id.* at 630, 579 S.E.2d at 906. This Court noted, "[t]he trial court's order effectively reduced the award of medical compensation to the hospitals. As can be gleaned from the order, the trial court determined that [the plaintiff's attorneys] had done the hospitals a great service, and therefore felt that the deduction was justified in the interest of fairness and equity." *Id.*

On appeal by the defendant-employer, this Court held "[t]he trial court may not [...] reduce the compensation paid to medical providers in order to fund the fee award." *Id.* at 638, 579 S.E.2d at 909. Here, like in *Palmer I* and contrary to this Court's holding, the Commission, without any statutory or other authority, purported to order additional attorney's fees to be deducted from the proceeds of attendant care medical compensation due to a third-party medical provider. *Id.*

Under *Palmer I*, and N.C. Gen. Stat. 97-90 this purported award is clearly prohibited and unlawful. We are bound by our prior decisions. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("[A] panel of the Court of Appeals is bound by a prior decision of another panel of the same court addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court.") Plaintiff has failed to demonstrate the rule set forth in *Palmer I* does not control the issue before us. *Id.*

This Court later revisited the *Palmer* case in *Palmer v. Jackson*, 161 N.C. App. 642, 590 S.E.2d 275 (2003) ("*Palmer II*"). The Court upheld the Commission's determination that the plaintiff's caretakers were entitled to payment of \$7.00 per hour and interest accrued for providing past and future attendant medical care to the plaintiff. The defendants were ordered to pay the plaintiff's counsel "a fee equal to twenty-five percent of the lump sum amount retroactively paid for attendant care for attorney's fees." *Id.* at 650, 590 S.E.2d at 279. Nothing in the Commission's award required the fees to be paid from the compensation due to a third-party medical provider.

Defendants in *Palmer II* did not argue before this Court that the Commission had erred by awarding an attorney's fee to be paid from the award of attendant care medical compensation. The plaintiff argued "the Commission failed to address whether defendants wrongfully defended the claim for retroactive care without reasonable grounds."

REED v. CAROLINA HOLDINGS

[251 N.C. App. 782 (2017)]

Id. at 649, 590 S.E.2d at 279. This Court overruled the plaintiff's argument and determined, "[i]t is apparent that the Commission did consider plaintiff's claim and awarded those fees which it believed to be appropriate." *Id.* at 650, 590 S.E.2d at 279.

This Court did not rule upon the Commission's authority to award attorney's fees to be paid directly from the proceeds of attendant care medical compensation due to a third-party provider absent statutory authority. The *Palmer II* case is wholly uninformative on this issue.

2. "[E]very litigant is responsible for his or her own attorney's fees."

The statute and this Court's decision in *Palmer I* are wholly consistent with the long established common and statutory law of North Carolina regarding the award of attorney's fees. "[T]he general rule has long obtained that a successful litigant *may not recover attorneys' fees*, whether as costs or as an item of damages, unless such a recovery is *expressly authorized by statute*." *Enterprises, Inc. v. Equipment Co.*, 300 N.C. 286, 289, 266 S.E.2d 812, 814 (1980) (citing *Hicks v. Albertson*, 284 N.C. 236, 200 S.E. 2d 40 (1972)) (emphasis supplied).

"Even in the face of a carefully drafted contractual provision indemnifying a party for such attorney's fees as may be necessitated by a successful action . . . , our courts have consistently refused to sustain such an award absent statutory authority therefor." *Id.* at 289, 266 S.E.2d at 814-15 (citing *Howell v. Roberson*, 197 N.C. 572, 150 S.E. 32 (1929); *Tinsley v. Hoskins*, 111 N.C. 340, 16 S.E. 325 (1892)); *see also Bailey v. State*, 348 N.C. 130, 159, 500 S.E.2d 54, 71 (1998) ("[T]he general rule in this country [is] that every litigant is responsible for his or her own attorney's fees.")

The Workers' Compensation Act provides very specific circumstances by the General Assembly under which the Commission may award an attorney a fee for representation of the injured employee, none of which apply here. *See* N.C. Gen. Stat. § 97-88 (2015) (allows attorney's fees to an injured employee if the insurer has appealed a decision to the Full Commission or to any court, and on appeal, the Commission or court has ordered the insurer to make, or continue making, payments of benefits to the employee); N.C. Gen. Stat. § 97-88.1 (2015) (where a hearing was brought, prosecuted, or defended without reasonable ground, the Commission may assess the whole cost of the proceedings including reasonable fees for either party's attorney upon the party who has brought or defended them); N.C. Gen. Stat. § 97-90(c) (2015) (allows for Commission to award fees resulting from a contract between the employee and his or her attorney).

REED v. CAROLINA HOLDINGS

[251 N.C. App. 782 (2017)]

The Workers' Compensation Act contains no statutory authority to allow the Commission to award an additional plaintiff's attorney's fee to be paid from an award of attendant care medical compensation provided by and due a third-party medical provider. In the absence of specific statutory authority for such award, the Commission is without any authority whatsoever to award attorney's fees therefrom, and the long-standing common law and general rule controls. Each party is responsible to pay for his or her own attorney's fees. *Enterprises*, 300 N.C. at 289, 266 S.E.2d at 814.

Our binding precedent in *Palmer I*, and the well-settled Supreme Court precedents adopting and affirming the common law rule controls the Commission's unlawful award of additional Plaintiff's attorney's fees. Absent specific statutory authority for fee shifting, a litigant is responsible to pay his or her own attorney's fees. *Id.* The Commission is without any statutory or case law authority to award Plaintiff additional attorney's fees to be deducted and paid from proceeds of attendant care or other compensation due and payable to a third party medical provider. *Palmer I*, 157 N.C. App. at 638, 579 S.E.2d at 909. That portion of the Commission's Opinion and Award is contrary to the Workers' Compensation Act and controlling case law, and should be vacated.

III. Conclusion

Defendants have standing to bring this appeal to this Court as parties aggrieved by entry of the Industrial Commission's award of attendant care medical compensation. *Saunders*, __ N.C. App. at __, 791 S.E.2d at 472. All issues raised by Defendants before the Deputy Commissioner and Full Commission are properly appealed and before this Court. Plaintiff's tardy motion to dismiss is without merit, and should be denied in its entirety.

Payments for attendant care provided by a third-party, as conceded by all counsel, are defined as medical compensation under N.C. Gen. Stat. § 97-2(19) and in *Palmer I*, 157 N.C. App. at 638, 579 S.E.2d at 909. Under *Palmer I*, medical compensation proceeds due a third-party provider cannot be reduced or offset to fund additional fees for Plaintiff's attorney. *Id.*

No statutory authority exists under the Workers' Compensation Act or under any case law for the Commission to order payment of Plaintiff's attorney's fees from an award of attendant care services provided by, and from medical compensation proceeds payable and due, a third-party provider. In the absence of specific statutory authority for the

STATE v. BRODY

[251 N.C. App. 812 (2017)]

Commission to order such award, the North Carolina precedents affirming the long standing common law and general rule controls: “every litigant is responsible for his or her own attorney’s fees.” *Bailey*, 348 N.C. at 159, 500 S.E.2d at 71.

The Commission is without statutory authority, and erred as a matter of law by purporting to award Plaintiff’s attorney an additional fee to be offset from the proceeds of attendant care compensation that is awarded and payable to a third-party medical provider. *Id.* The opinion and award of the Full Commission on this issue should be vacated. I respectfully dissent.

STATE OF NORTH CAROLINA

v.

JAMES PAUL BRODY

No. COA16-336

Filed 7 February 2017

**Search and Seizure—motion to suppress evidence—residence—
search warrant—confidential informant—probable cause**

The trial court did not err in a drug trafficking case by denying defendant’s motion to suppress evidence obtained from his residence pursuant to a search warrant. The search warrant application relying, principally on information obtained from a confidential informant, was sufficient to support a magistrate’s finding of probable cause.

Appeal by defendant from judgment entered 1 October 2015 by Judge Carla N. Archie in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 September 2016.

Joshua H. Stein, Attorney General, by Jeremy D. Lindsley, Assistant Attorney General, for the State.

Knox, Brotherton, Knox & Godfrey, by Allen C. Brotherton, for defendant-appellant.

DAVIS, Judge.

STATE v. BRODY

[251 N.C. App. 812 (2017)]

In this appeal, we consider whether a search warrant application relying principally upon information obtained from a confidential informant was sufficient to support a magistrate's finding of probable cause. James Paul Brody ("Defendant") appeals from the trial court's order denying his motion to suppress evidence obtained from his residence pursuant to a search warrant. Because we conclude that the affidavit in support of the search warrant application was sufficient to establish probable cause, we affirm.

Factual and Procedural Background

On 14 October 2014, the Charlotte-Mecklenburg Police Department began an investigation into possible drug trafficking by Defendant. On 28 October 2014, Detective E.D. Duft applied for a warrant to search Defendant's home located at 3124 Olde Creek Trail in Matthews, North Carolina. The application was supported by an affidavit in which Detective Duft described his investigation of Defendant, including information about Defendant's drug dealing activity that was obtained through a confidential informant (the "CI"). A magistrate issued the search warrant that same day.

Upon executing the search warrant, Detective Duft seized evidence of illegal drugs in Defendant's home. On 30 March 2015, Defendant was indicted for maintaining a place to keep controlled substances, possession with intent to sell or deliver marijuana, possession of marijuana, possession with intent to sell or deliver cocaine, carrying a concealed weapon, and possession of drug paraphernalia.

On 19 August 2015, Defendant filed a motion to suppress the evidence seized pursuant to the search warrant, arguing that the affidavit submitted by Detective Duft was insufficient to establish probable cause to issue the warrant. The motion was heard before the Honorable Carla N. Archie in Mecklenburg County Superior Court on 1 October 2015. After hearing arguments from the parties, the trial court denied the motion.

That same day, pursuant to a plea agreement, Defendant subsequently pled guilty to the charge of possession with intent to sell or deliver cocaine, and the remaining charges were dismissed. As part of the plea arrangement, Defendant reserved his right to appeal the denial of his motion to suppress. The trial court sentenced Defendant to 5 to 15 months imprisonment, suspended the sentence, and placed him on 18 months of supervised probation. On 22 December 2015, the trial court issued a written order denying Defendant's motion to suppress. Defendant filed a timely notice of appeal.

STATE v. BRODY

[251 N.C. App. 812 (2017)]

Analysis

Defendant's sole argument on appeal is that the trial court erred in denying his motion to suppress evidence found during the search of his home because the search warrant obtained by Detective Duft was not supported by probable cause. A defendant "is entitled to mandatory appellate review of an order denying a motion to suppress when his conviction judgment was entered pursuant to a guilty plea" if he expressly preserved the right to appeal that ruling. *State v. Banner*, 207 N.C. App. 729, 731, 701 S.E.2d 355, 357 (2010). Here, because Defendant specifically reserved his right to appeal when he entered his guilty plea, his appeal is properly before us.

An application for a search warrant must include (1) a statement that there is probable cause to believe that items subject to seizure may be found in the place described; and (2) "one or more affidavits particularly setting forth the facts and circumstances establishing probable cause to believe that the items are in the places or in the possession of the individuals to be searched[.]" N.C. Gen. Stat. § 15A-244 (2015). In determining whether to issue a warrant, the magistrate must "make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. Arrington*, 311 N.C. 633, 638, 319 S.E.2d 254, 257-58 (1984) (citation omitted).

When the motion to suppress is based upon a defendant's contention that the search warrant obtained was not supported by probable cause, the trial court must determine whether, based on the totality of the circumstances, "the evidence as a whole provides a substantial basis for concluding that probable cause exists." *State v. Sinapi*, 359 N.C. 394, 398, 610 S.E.2d 362, 365 (2005) (citation and quotation marks omitted); *see also State v. McCoy*, 100 N.C. App. 574, 576, 397 S.E.2d 355, 357 (1990) ("The standard for a court reviewing the issuance of a search warrant is whether there is substantial evidence in the record supporting the magistrate's decision to issue the warrant." (citation and quotation marks omitted)).

Probable cause . . . means a reasonable ground to believe that the proposed search will reveal the presence upon the premises to be searched of the objects sought and that those objects will aid in the apprehension or conviction of the offender. Probable cause does not mean actual and positive cause, nor does it import absolute certainty. . . .

STATE v. BRODY

[251 N.C. App. 812 (2017)]

If the apparent facts set out in an affidavit for a search warrant are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a search warrant.

State v. Campbell, 282 N.C. 125, 128-29, 191 S.E.2d 752, 755 (1972) (internal citations and quotation marks omitted).

In the present case, Detective Duft's affidavit in support of his warrant application stated, in pertinent part, as follows:

Detective E. Duft, #1847, has received information from a confidential and reliable informant that James Paul BRODY is possessing and selling cocaine from his residence at 3124 Olde Creek Trail, Matthews, NC.

On October 14, 2014, investigators received information and began an investigation into the cocaine trafficking activities of James Paul BRODY. This informant has arranged, negotiated and purchased cocaine from BRODY under the direct supervision of Detective Duft. This informant has been to 3124 Olde Creek Trail, Matthews, NC within the past 48 hours and has observed BRODY possessing and selling cocaine. This informant has been to this location on approximately 30 plus occasions and has observed BRODY possessing and selling cocaine on each occasion. This informant has also described seeing a fire-arm at this location.

Investigators have known this informant for approximately two weeks. This informant has provided information on other persons involved in drug trafficking in the Charlotte area which we have investigated independently. Through interviews with the informant, detectives know this informant is familiar with drug pricing and how controlled substances are packaged and sold for distribution in the Charlotte area.

Detective E.D. Duft, #1847, has eighteen (18) years of law enforcement experience with three (3) years as a street drug interdiction officer, five (5) years as a vice and narcotics detective for the Charlotte-Mecklenburg Police Department and ten (10) years as a Task Force Officer for the Drug Enforcement Administration (DEA).

STATE v. BRODY

[251 N.C. App. 812 (2017)]

[Detective Duft] has attended narcotics schools on both the state and federal level including: a two day Street Drug Interdiction school, an Undercover Drug School, a Pipeline Drug School, Jetway Drug Training, DEA Basic Drug Investigators School, DEA Task Force Officer school, Rave and Club Drug Investigations, Financial Investigations, Telephone Exploitation and Basic, Advanced Internet Communication Exploitation and Clandestine Lab Training and certification.

Based upon this affidavit, the magistrate determined that there was probable cause to issue the search warrant. The trial court subsequently ruled that the magistrate had properly granted the warrant, concluding that (1) “[s]ufficient detail was present in the search warrant to assure the magistrate of the informant’s reliability”; (2) “[t]here was a substantial basis to believe that a fair probability existed that a controlled substance would be found in the residence identified in the search warrant”; and (3) “[p]robable cause existed to issue the search warrant.”

On appeal, Defendant argues that probable cause was not established because the affidavit failed to show that the CI was reliable and that drugs were likely to be found in Defendant’s home. It is well established that probable cause may be shown through the use of information provided by informants. *State v. Brown*, 199 N.C. App. 253, 257, 681 S.E.2d 460, 463 (2009). “In utilizing an informant’s tip, probable cause is determined using a totality-of-the-circumstances analysis which permits a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending an informant’s tip.” *State v. Holmes*, 142 N.C. App. 614, 621, 544 S.E.2d 18, 22 (2001) (citation and quotation marks omitted).

The indicia of reliability of an informant’s tip may include (1) whether the informant was known or anonymous, (2) the informant’s history of reliability, and (3) whether information provided by the informant could be independently corroborated by the police.

Brown, 199 N.C. App. at 258, 681 S.E.2d at 463 (citation and quotation marks omitted).

“A known informant’s information may establish probable cause based upon a reliable track record in assisting the police.” *State v. Leach*, 166 N.C. App. 711, 716, 603 S.E.2d 831, 835 (2004), *appeal dismissed*, 359 N.C. 640, 614 S.E.2d 538 (2005); *see also State v. McRae*, 203 N.C. App.

STATE v. BRODY

[251 N.C. App. 812 (2017)]

319, 324, 691 S.E.2d 56, 60 (2010) (“[A] tip from a reliable, confidential informant may supply probable cause[.]”).

Our caselaw emphasizes the importance of distinguishing between anonymous informants and informants who are known to the officers and have provided reliable information in the past. “[T]he difference in evaluating an anonymous tip as opposed to a reliable, confidential informant’s tip is that the overall reliability is more difficult to establish, and thus some corroboration of the information or greater level of detail is generally necessary.” *McRae*, 203 N.C. App. at 325, 691 S.E.2d at 61 (citation, quotation marks, and brackets omitted); see also *State v. Crowell*, 204 N.C. App. 362, 366, 693 S.E.2d 370, 373 (2010) (concluding that corroboration by police was not required to establish reliability of tip provided by known informant who had demonstrated past reliability); *Chadwick*, 149 N.C. App. at 203, 560 S.E.2d at 209 (“A known informant’s information may establish probable cause based on a reliable track record, or an anonymous informant’s information may provide probable cause if the caller’s information can be independently verified.”).

We find instructive our decision in *State v. Barnhardt*, 92 N.C. App. 94, 373 S.E.2d 461, *disc. review denied*, 323 N.C. 626, 374 S.E.2d 593 (1988). In *Barnhardt*, a detective stated in his affidavit supporting a search warrant application that he had received information from a confidential informant who had “personally observed a large amount of cocaine at the residence of [the defendant]” within 24 hours prior to the affidavit being sworn and had provided a detailed description of the outside of the defendant’s home. *Id.* at 97, 373 S.E.2d at 463. The detective’s affidavit also reflected that the informant knew what cocaine looked like because he had purchased the drug in the past. *Id.* at 98, 373 S.E.2d at 463. The detective acknowledged in the affidavit that the informant had “never given any information to me before.” *Id.*

Based on this affidavit, the magistrate found probable cause to issue a search warrant for the defendant’s home. On appeal, we held that the affidavit was sufficient to support the magistrate’s probable cause determination, explaining that it

provided timely information, exact detail of the premises to be searched, and it described the informant’s ability to identify cocaine. These circumstances, supplemented by the officer’s credentials and experience, amount to a substantial basis for the magistrate’s determination that probable cause existed.

Id.

STATE v. BRODY

[251 N.C. App. 812 (2017)]

The affidavit in the present case provided an even stronger basis for a probable cause finding. Here, Detective Duft's affidavit stated that investigators had known the CI for two weeks, the CI had previously provided them with information on other persons involved in drug trafficking in the area, and Detective Duft considered the CI to be a "reliable informant." The CI had demonstrated to Detective Duft that he was "familiar with drug pricing and how controlled substances are packaged and sold for distribution in the Charlotte area." Moreover, the CI had previously "arranged, negotiated and purchased cocaine from [Defendant] under the direct supervision of Detective Duft."¹ In addition, the CI revealed to Detective Duft that he had visited Defendant's home approximately 30 times — including a visit that occurred within 48 hours prior to the affidavit being sworn — and "observed [Defendant] possessing and selling cocaine on each occasion." Finally, the affidavit reflected that Detective Duft possessed 18 years of law enforcement experience, including significant experience and training relating to the investigation of drug trafficking.

Accordingly, viewing all of these facts under the totality of the circumstances, we conclude that the magistrate had a substantial basis for determining that probable cause existed to believe cocaine was present in Defendant's home based on Detective Duft's affidavit and the permissible inferences that could be drawn from it. *See State v. Taylor*, 191 N.C. App. 587, 590, 664 S.E.2d 421, 423 (2008) ("[T]he duty of the reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed." (citation, quotation marks, brackets, and ellipsis omitted)); *State v. Benters*, 367 N.C. 660, 665, 766 S.E.2d 593, 598 (2014) ("[A] magistrate is entitled to draw reasonable inferences from the material supplied to him by an applicant for a warrant." (citation and quotation marks omitted)).

We are unpersuaded by Defendant's contention that Detective Duft's affidavit failed to adequately demonstrate the CI's reliability. The affidavit stated both that (1) law enforcement officers independently investigated prior information provided by the CI; and (2) Detective Duft

1. Defendant points out that the affidavit does not specify whether or not this purchase occurred at Defendant's home. However, regardless of whether it took place at Defendant's residence or at some other location, this purchase nevertheless (1) added support to Detective Duft's determination that the CI was reliable; and (2) demonstrated that Defendant was engaged in the sale of drugs. Thus, the purchase, in conjunction with the CI having previously observed cocaine at Defendant's home on numerous occasions (including within the prior 48 hours), added support to the magistrate's probable cause determination.

STATE v. BRODY

[251 N.C. App. 812 (2017)]

considered the CI to be a “reliable informant.” The fact that the affidavit did not describe the precise outcomes of the previous tips from the CI did not preclude a determination that the CI was reliable. Although a general averment that an informant is “reliable” — taken alone — might raise questions as to the basis for such an assertion, the fact that Detective Duft also specifically stated that investigators had received information from the CI in the past allows for a reasonable inference that such information demonstrated the CI’s reliability. *See, e.g., State v. Edwards*, 185 N.C. App. 701, 705, 649 S.E.2d 646, 649 (“Even though Officer Warren did not spell out in exact detail the connection between the informant and the previous drug investigations, the magistrate could properly infer the confidential informant had provided reliable information to Officer Warren in previous situations.”), *disc. review denied*, 362 N.C. 89, 656 S.E.2d 281 (2007). Moreover, Detective Duft had further opportunity to gauge the CI’s reliability when “he arranged, negotiated and purchased cocaine from [Defendant] under the direct supervision of Detective Duft.”

We also reject Defendant’s assertion that this case is controlled by *Taylor*. In that case, a special agent for the sheriff’s office with two years of law enforcement experience submitted an affidavit in support of a search warrant for a location containing both a mobile home and a house. *Taylor*, 191 N.C. App. at 588, 664 S.E.2d at 422. In his affidavit, the special agent averred that a confidential informant — whom he had previously found to be reliable — had “visited the described location at the direction and surveillance of this [a]pplicant and while at the location . . . made a purchase of the controlled substance.” *Id.*

A magistrate issued a warrant, and drugs were found in the house when the warrant was executed. The defendant filed a motion to suppress, which the trial court granted on the ground that the special agent’s affidavit did not establish probable cause. *Id.* at 589, 664 S.E.2d at 422. The State appealed, and we affirmed the trial court’s ruling, explaining as follows:

[N]o facts were alleged in the affidavit that particularly set forth where on the premises the drug deals occurred. The affidavit merely stated that the CI “had visited the described location” and made controlled purchases of cocaine “while at the location,” without particularly stating which, if any, of the two dwellings he entered to make the purchases. There were also no facts alleged in the affidavit that identified the defendant as the owner of either residence. Additionally, Special Agent Perry had only been

STATE v. BRODY

[251 N.C. App. 812 (2017)]

working in law enforcement for two years at the time he applied for the search warrant. He also failed to include facts regarding whether he observed the transactions between the CI and the seller himself, and did not establish the identity of the seller of the cocaine as defendant. Finally, Special Agent Perry's affidavit failed to identify the Sampson County Sheriff's Office procedure for controlled purchases of controlled substances and was silent as to whether he followed that procedure with the CI. Special Agent Perry merely stated that the CI had been proven reliable in the past by following the controlled purchase procedure, but did not allege that the procedure was followed in the present investigation, alleging only that "while at the location the [CI] made a purchase of the controlled substance. Immediately after leaving the location, the [CI] met with the applicant and turned over the controlled substance."

Id. at 590-91, 664 S.E.2d at 423-24 (emphasis omitted).

The present case is distinguishable from *Taylor* for a number of reasons. First, there is no ambiguity here as to which of multiple dwellings listed in an affidavit was likely to contain the contraband sought or whether the defendant was the owner of the home at issue. Detective Duft's affidavit stated that the CI had seen Defendant inside the one residence listed in the affidavit — Defendant's home — approximately 30 times in the past, including within 48 hours of the affidavit being sworn. Moreover, unlike the officer in *Taylor* — who possessed only limited law enforcement experience — Detective Duft has worked in law enforcement for 18 years and has extensive drug enforcement experience and training.

In reaching our decision in this case, we are mindful that our Supreme Court has cautioned that a "grudging or negative attitude by reviewing courts toward warrants is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant; courts should not invalidate warrants by interpreting affidavits in a hypertechnical, rather than a commonsense, manner." *State v. Riggs*, 328 N.C. 213, 222, 400 S.E.2d 429, 434-35 (1991) (citation, quotation marks, and brackets omitted). "[G]reat deference should be paid a magistrate's determination of probable cause and . . . after-the-fact scrutiny should not take the form of a *de novo* review." *Benters*, 367 N.C. at 665, 766 S.E.2d at 598 (citation and quotation marks omitted). Therefore, "[t]he resolution of

STATE v. CHOLON

[251 N.C. App. 821 (2017)]

doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.” *Id.* at 675, 766 S.E.2d at 604 (citation and quotation marks omitted).

We are satisfied that Detective Duft’s affidavit contained sufficient information to support the magistrate’s determination that probable cause existed to issue the search warrant. Accordingly, we affirm the trial court’s denial of Defendant’s motion to suppress.

Conclusion

For the reasons stated above, we conclude that the trial court did not err in denying Defendant’s motion to suppress.

AFFIRMED.

Judges CALABRIA and TYSON concur.

STATE OF NORTH CAROLINA,
v.
DEREK JACK CHOLON, DEFENDANT

No. COA16-4

Filed 7 February 2017

1. Constitutional Law—effective assistance of counsel—concessions in argument

Defendant’s counsel was not per se ineffective in a prosecution for first-degree sexual offense and indecent liberties with a child where his counsel maintained his innocence and did not expressly admit all of the elements of the crimes, although counsel made some concessions in his argument.

2. Criminal Law—motion for appropriate relief on appeal—ineffective assistance of counsel—no prejudice

Defendant’s motion for appropriate relief on appeal, based on a claim for ineffective assistance of counsel, was denied where there was overwhelming evidence of his guilt and he did not meet his burden of showing that, but for his counsel’s statements in closing argument, the result of the proceeding would have been different.

STATE v. CHOLON

[251 N.C. App. 821 (2017)]

Appeal by Defendant from judgment entered 9 July 2015 by Judge Jack W. Jenkins in Onslow County Superior Court. Heard in the Court of Appeals 24 May 2016.

Attorney General Joshua H. Stein, by Assistant Attorney General Alexandra Gruber, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender John F. Carella, for Defendant-Appellant.

INMAN, Judge.

Defense counsel's closing arguments, which admitted some elements of the charged offenses, while maintaining Defendant's innocence, did not constitute *per se* ineffective assistance of counsel.

Derek Jack Cholon ("Defendant") appeals the judgment entered after a jury found him guilty of statutory sexual offense and taking indecent liberties with a child. On appeal, Defendant contends that he received ineffective assistance of counsel. After careful review, we hold that Defendant has failed to demonstrate reversible error in his direct appeal.

I. Factual And Procedural History

The State's evidence tended to show the following:

On 6 March 2013, Defendant met M.B. through Jack'd, described as "an application where you can meet gay men and have sex." M.B. was 15 years old at the time; however, he indicated on his online profile that he was 18 years old, the minimum age requirement for Jack'd. M.B. received a signal on Jack'd indicating that Defendant wanted to speak with M.B. Defendant and M.B. exchanged messages and nude photographs. They agreed to meet later that night in Jacksonville, North Carolina, at a stop sign at the end of the street where M.B. lived.

Defendant arrived at the stop sign at approximately 10:30 pm. M.B. got into the front passenger seat of Defendant's car and instructed him to drive to a dirt road in a wooded area located in the back of the neighborhood. Once there, Defendant performed oral sex on M.B. and M.B. "fingered" Defendant. They remained in Defendant's car for twenty to thirty minutes until a Jacksonville Police Department patrol car arrived, turned on bright "takedown lights," and Officer Taylor Wright approached Defendant's car. Officer Wright, who had been patrolling the neighborhood following a series of break-ins, had driven down the dirt road in response to a suspicious vehicle report.

STATE v. CHOLON

[251 N.C. App. 821 (2017)]

Defendant and M.B. each initially told Officer Wright that they were just sitting and talking. Officer Wright requested that her backup, Officer David Livingston, question M.B. alone while she spoke with Defendant. M.B. initially told Officer Livingston that he was 18 years old and provided a false address. However, after Officer Livingston expressed doubt as to M.B.'s truthfulness, M.B. admitted that he was 15 years old and provided his correct address.

Defendant told Officer Wright that "he had performed oral sex on [M.B.], and that they were kissing." Defendant said he believed that M.B. was 18 years old. Officer Wright confirmed Defendant's birth date as 16 December 1971. After determining that Defendant had outstanding warrants, Officer Wright arrested Defendant and transported him to the Jacksonville Police Department. At the station, Defendant made a written statement, containing in pertinent part:

We proceeded to a secluded area and sat in the car and talked. After about ten minutes, the police arrived. Before the police arrived, I gave [M.B.] oral and we kissed. I advised the police that I have screen shots of his two profiles on my phone, and that I asked [M.B.] his age and he said he was 18.

On 8 April 2014, Defendant was indicted on one count each of first degree statutory sexual offense, crime against nature, and indecent liberties with a child. The charges¹ came on for trial on 7 July 2015 in Onslow County Superior Court, Judge Jack W. Jenkins presiding.

On the first day of trial, defense counsel filed a motion to suppress Defendant's alleged verbal statements to police and his subsequent written statement. In support of the motion to suppress, counsel submitted an affidavit by Defendant stating under oath that he did not tell Officer Wright at any time that he engaged in oral sex or kissing with M.B. and stating that he does not remember giving an oral statement to police, because of a medical condition that makes him prone to blackout. The trial court denied the motion, and the oral and written statements were admitted into evidence.

Defendant did not testify or present evidence at trial. In his closing argument to the jury, defense counsel conceded that M.B. was a minor at the time of the sexual encounter and that Defendant's oral and written confessions to police were true. Specifically, defense counsel said about M.B.: "He, apparently was, and I don't think otherwise, that on this

1. Prior to trial, the State abandoned the crime against nature charge.

STATE v. CHOLON

[251 N.C. App. 821 (2017)]

occasion he was 15 years old.” In reviewing with the jury Defendant’s statements to officers, defense counsel remarked:

What does [Defendant] say? The officer comes back there, Officer Wright comes back there and begins to talk to him and he tells this officer the truth; tells her what happened between the two of them. “I gave him oral, and we were kissing.” But now we know that there’s more than kissing going on with [M.B.]. He gets on the stand and he admits that he was massaging or using his fingers to massage [Defendant’s] anus. So now he admits that.

...

[Defendant] did not say anything that was not truthful, apparently except, “We were just talking.” And when the officers persisted with the asking about what happened, he told them the truth. He didn’t lie to them. He wrote it down in a statement, which you read. So here he is. He’s looking—subject to go to prison for such a long time.

The jury found Defendant guilty of both charges. He was sentenced to concurrent prison terms of 144 to 233 months for statutory sexual offense and 10 to 21 months for taking indecent liberties with a minor. The trial court also ordered Defendant to register as a sex offender for thirty years. Defendant gave oral notice of appeal in open court.

One week later, Defendant submitted a *pro se* letter to the trial court requesting a mistrial on the basis that his counsel “entered an admission of guilt on my behalf without my permission during his closing statement.”

II. Ineffective Assistance of Counsel

Defendant argues that his trial counsel admitted guilt to each disputed element of the charged offenses in closing argument without his consent, constituting *per se* ineffective assistance of counsel. Because defense counsel only implicitly conceded some—but not all—of the elements of each charge and urged jurors to find Defendant not guilty of each charge, we hold that counsel was not *per se* ineffective.

A. *Standard of Review and Legal Standards for Ineffective Assistance of Counsel Claims*

“On appeal, this Court reviews whether a defendant was denied effective assistance of counsel *de novo*.” *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014) (citation omitted).

STATE v. CHOLON

[251 N.C. App. 821 (2017)]

In general, state appellate courts including this Court determine claims of ineffective assistance of counsel following the standards established by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed.2d 674 (1984). To establish ineffective assistance of counsel under *Strickland*, “[f]irst, the defendant must show that counsel’s performance was deficient.” *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985). “Second, the defendant must show that the deficient performance prejudiced the defense.” *State v. Campbell*, 359 N.C. 644, 690, 617 S.E.2d 1, 29 (2005) (quoting *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693). However, the North Carolina Supreme Court has identified one type of ineffective assistance of counsel that is *per se* prejudicial. In *State v. Harbison*, the North Carolina Supreme Court held that “ineffective assistance of counsel, *per se* in violation of the Sixth Amendment, has been established in every criminal case in which the defendant’s counsel admits the defendant’s guilt to the jury without the defendant’s consent.” 315 N.C. 175, 180, 337 S.E.2d 504, 507-08 (1985).

B. Analysis

[1] Defendant contends that he received ineffective assistance of counsel *per se* when his trial counsel conceded all of the elements of the State’s case in closing argument without Defendant’s consent, so that pursuant to *Harbison*, this Court must order a new trial.

In *Harbison*, the defendant’s counsel maintained throughout trial that the defendant had acted in self-defense; however, during closing arguments, defense counsel urged the jury to convict the defendant of manslaughter rather than first-degree murder. *Id.* at 177-78, 337 S.E.2d at 506. The North Carolina Supreme Court held that counsel rendered *per se* ineffective assistance to the defendant, explaining:

[T]he gravity of the consequences demands that the decision to plead guilty remain in the defendant’s hands. When counsel admits his client’s guilt without first obtaining the client’s consent, the client’s rights to a fair trial and to put the State to the burden of proof are completely swept away. The practical effect is the same as if counsel had entered a plea of guilty without the client’s consent. Counsel in such situations denies the client’s right to have the issue of guilt or innocence decided by a jury.

Id. at 180, 337 S.E.2d at 507.

In a line of cases following *Harbison*, our appellate courts have found that “a defendant receives ineffective assistance of counsel *per se*

STATE v. CHOLON

[251 N.C. App. 821 (2017)]

when the defendant's counsel concedes the defendant's guilt to either the offense charged or a lesser-included offense without the defendant's consent." *State v. Holder*, 218 N.C. App. 422, 424, 721 S.E.2d 365, 367 (2012) (citation omitted). But our courts have distinguished *Harbison* in cases in which defense counsel did not *expressly concede* the defendant's guilt or admitted only certain elements of the charged offense. *See, e.g., State v. Gainey*, 355 N.C. 73, 92-93, 558 S.E.2d 463, 476 (2002) (holding no *Harbison* violation occurred when defense counsel stated "if he's guilty of anything, he's guilty of accessory after the fact," because the statement did not amount to an admission of murder and the defendant was not charged as an accessory); *State v. Hinson*, 341 N.C. 66, 78, 459 S.E.2d 261, 268 (1995) (holding no *Harbison* violation occurred when defense counsel did not concede to the jury that the defendant himself had committed any crime); *State v. Fisher*, 318 N.C. 512, 532-33, 350 S.E.2d 334, 346 (1986) (holding no *Harbison* violation occurred when defense counsel conceded malice—an element of first-degree murder—but did not clearly admit guilt and told the jury it could find the defendant not guilty); *State v. Wilson*, 236 N.C. App. 472, 475-78, 762 S.E.2d 894, 896-97 (2014) (holding no *Harbison* violation occurred when defense counsel conceded that the defendant, who was charged with attempted first degree murder, was guilty of assault by pointing a gun, a charge not presented to the jury); *State v. Randle*, 167 N.C. App. 547, 551-52, 605 S.E.2d 692, 695 (2004) (noting that "our Supreme Court has found no *Harbison* violation where defense counsel did not expressly admit the defendant's guilt"); *State v. Maniego*, 163 N.C. App. 676, 684, 594 S.E.2d 242, 247 (2004) (holding that defense counsel's opening statement placing the defendant at the scene of the crime was not a concession of guilt under *Harbison*).

Here, Defendant was charged with statutory sexual offense pursuant to N.C. Gen. Stat. § 14-27.7A(a) (2013)², providing for a defendant's guilt "if the defendant engages in vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old and the defendant is at least six years older than the person, except when the defendant is lawfully married to the person," and indecent liberties pursuant to N.C. Gen. Stat. § 14-202.1(a)(2) (2013), providing for a defendant's guilt if, "being 16 years of age or more and at least five years older than the child in question, he . . . [w]illfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years."

2. N.C. Gen. Stat. § 14-27.7A was recodified as N.C. Gen. Stat. § 14-27.25, effective 1 December 2015. 2015 N.C. Sess. Laws. ch. 181, § 7(a).

STATE v. CHOLON

[251 N.C. App. 821 (2017)]

Defense counsel did not expressly concede Defendant's guilt. See *Maniego*, 163 N.C. App. at 683, 594 S.E.2d at 246 ("To establish a *Harbison* claim, the defendant must first show that his trial attorney has made a concession of guilt."). Defense counsel did not admit each element of each offense. For example, defense counsel did not admit that Defendant was six or more years older than M.B. and did not admit that Defendant willfully committed a lewd or lascivious act. N.C. Gen. Stat. § 14-27.7A; N.C. Gen. Stat. § 14-202.1(a)(2). And at the close of his argument, defense counsel asked the jury to find Defendant not guilty of the charged offenses.

"Admission by defense counsel of an element of a crime charged, while still maintaining the defendant's innocence, does not necessarily amount to a *Harbison* error." *Wilson*, 236 N.C. App. at 476, 762 S.E.2d at 897. Accordingly, we hold that the principles set out in *Harbison* do not require a finding of *per se* ineffective assistance of counsel in this case.

**III. The Trial Court's Failure to Conduct an Inquiry
or Take Further Action Following Defense Counsel's
Concessions in Closing Argument**

Defendant also contends, related to his *Harbison* argument, that the trial court erred by failing to inquire into defense counsel's concession of Defendant's guilt. Because we conclude that the record before us does not establish a *Harbison* error, we reject this argument as well.

IV. Motion for Appropriate Relief

[2] Defendant has filed concurrently with his direct appeal a motion for appropriate relief contending that he received ineffective assistance of counsel. Defendant argues that if this Court does not order a new trial, we should hold the appeal in abeyance, order the trial court to hold an evidentiary hearing, and direct the trial court to transmit the order to this Court so that it can rule on the motion. The record precludes Defendant's claim for ineffective assistance of counsel and no additional evidence could change the outcome of his claim. We therefore deny Defendant's motion.

Because this case "does not fall with the *Harbison* line of cases where violation of the defendant's Sixth Amendment rights are presumed, [Defendant's] claim of ineffective assistance of counsel must be analyzed using the *Strickland* factors." *Fisher*, 318 N.C. at 533, 350 S.E.2d at 346; see also *Strickland*, 346 N.C. at 460–61, 488 S.E.2d at 205. To obtain relief pursuant to *Strickland*, a defendant must demonstrate not only that his counsel's performance was deficient, but that it prejudiced

STATE v. CHOLON

[251 N.C. App. 821 (2017)]

the defense. *Braswell*, 312 N.C. at 562, 324 S.E.2d at 248; *Campbell*, 359 N.C. at 690, 617 S.E.2d at 29. If defense counsel's performance did not prejudice the defense, we need not determine whether counsel's performance was deficient. *State v. Phillips*, 365 N.C. 103, 122, 711 S.E.2d 122, 138 (2011). "Prejudice is established by showing 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Campbell*, 359 N.C. at 690, 617 S.E.2d at 29 (quoting *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693). Here, the record reveals such overwhelming evidence of Defendant's guilt that we cannot conclude that but for defense counsel's ineffective assistance, the result of the trial would have been different.

This Court has explained:

In general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal. This is so because this Court, in reviewing the record, is without the benefit of information provided by defendant to trial counsel, as well as defendant's thoughts, concerns, and demeanor, that could be provided in a full evidentiary hearing on a motion for appropriate relief. However, ineffective assistance of counsel claims are appropriately reviewed on direct appeal when the cold record reveals that no further investigation is required, *i.e.*, claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing.

State v. James, __ N.C. App. __, __, 774 S.E.2d 871, 876 (2015), *aff'd*, 368 N.C. 728, 782 S.E.2d 509 (2016) (internal quotation marks and citations omitted).

Here, the record is sufficient to conduct a *Strickland* analysis and no further investigation is required in order to conduct a meaningful review. The record precludes Defendant from demonstrating that, but for the alleged deficient performance of his counsel, he would have received a different verdict.

The State presented overwhelming evidence of Defendant's guilt as to both charges. At trial, Officer Wright testified that shortly after the incident, Defendant admitted that he had performed oral sex on M.B. and that they had kissed. Defendant's written statement, wherein he admitted that "I gave [M.B.] oral and we kissed," was also admitted into evidence. Testimonial evidence also established that Defendant was born in 1971, and that M.B. was 15 years of age at the time of the incident.

STATE v. DOWNEY

[251 N.C. App. 829 (2017)]

M.B. testified about the sexual encounter. In a hearing outside the presence of the jury, the trial court conducted a colloquy with Defendant regarding his right to testify. Defendant stated that he had previously decided not to testify and that it was still his decision not to testify.

Defendant has not met his burden to show that, but for his counsel's statements in closing argument, the result of the proceeding would be any different. Given our holding—based on careful consideration of the record—that Defendant did not receive ineffective assistance of counsel, we deny Defendant's motion for appropriate relief.

V. Conclusion

For the aforementioned reasons, we hold that Defendant has failed to establish prejudicial error.

NO ERROR.

Judges BRYANT and TYSON concur.

STATE OF NORTH CAROLINA
v.
GLENWOOD EARL DOWNEY

No. COA16-302

Filed 7 February 2017

Search and Seizure—traffic stopped—extended—reasonable suspicion

A traffic stop was not unduly extended, and defendant's motion to dismiss was properly denied, where the officer had reasonable suspicion to detain defendant due to defendant's nervous behavior; defendant's use of a particular brand of powerful air freshener favored by drug traffickers; defendant's prepaid cellphone; the fact that defendant's car was registered to someone else; defendant's vague and suspicious answers to the officer's questions concerning what he was doing in the area; and defendant's prior conviction on a drug offense.

Judge HUNTER, JR., dissenting in a separate opinion.

STATE v. DOWNEY

[251 N.C. App. 829 (2017)]

Appeal by defendant from order entered 16 September 2015 by Judge Thomas H. Lock and judgment entered 1 October 2015 by Judge Reuben F. Young in Johnston County Superior Court. Heard in the Court of Appeals 8 September 2016.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Richard E. Slipsky, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Michele A. Goldman, for defendant.

DIETZ, Judge.

Defendant Glenwood Earl Downey appeals the denial of his motion to suppress. Downey argues that law enforcement impermissibly extended the duration of his traffic stop without reasonable suspicion that he committed some other crime.

As explained below, there is ample competent evidence in the record to support the trial court's findings on various factors that this Court (and others) have found sufficient to establish reasonable suspicion. Before and during the time in which the officer prepared the warning citation, the officer observed the following: Downey's nervous behavior; Downey's use of a particular brand of powerful air freshener favored by drug traffickers; Downey's prepaid cellphone; the fact that Downey's car was registered to someone else; Downey's vague and suspicious answers to the officer's questions concerning what he was doing in the area; and Downey's prior conviction on a drug offense. These findings, supported by the record, readily support the trial court's conclusion that the officer had reasonable suspicion to detain Downey before the traffic stop concluded.

Facts and Procedural History

On 26 July 2011, Deputy Brian Clifton of the Johnston County Sheriff's Office stopped Defendant Glenwood Earl Downey for a traffic violation. Deputy Clifton approached Downey's vehicle and asked to see his driver's license and registration. As Downey handed over the requested documentation, Deputy Clifton noticed that Downey's hands were shaking, that his breathing was rapid, and that he failed to make eye contact.

Deputy Clifton also noticed a prepaid cellphone inside the vehicle and a Black Ice air freshener hanging from the rearview mirror. Deputy

STATE v. DOWNEY

[251 N.C. App. 829 (2017)]

Clifton had received special training in drug interdiction, during which he learned that Black Ice air fresheners, because of their strong scent, are frequently used by drug traffickers. As a result of that same training, he also knew that prepaid cellphones were commonly used by persons involved in narcotics trafficking.

Deputy Clifton further noted that the car was not registered to Downey. Based on his training, Deputy Clifton had learned that third-party vehicles are often used by drug traffickers because it makes it more difficult for police to track those individuals or tie them to a specific address.

Deputy Clifton asked Downey to exit the vehicle and accompany him to his patrol car. Once inside the patrol car, Deputy Clifton asked Downey why he was in the area. Downey vaguely responded that he was searching for a place to rent. Deputy Clifton asked Downey his motive for moving and offered the high cost of living in Downey's current town as a potential motive. Downey indicated that the expensive cost of living in his current town was indeed the reason he wanted to move. When Deputy Clifton further inquired as to whether Downey was able to find any places for rent, he vaguely responded that he had seen a few places on "what's that, 231?"

Based on indicators gleaned from a warrants check, Deputy Clifton also asked Downey about his criminal history. Downey responded (honestly) that he had served prison time for several breaking and entering convictions and that he had a cocaine-related drug conviction.

Deputy Clifton issued Downey a warning ticket for the traffic violation and returned his documentation. But Deputy Clifton continued to question Downey about his criminal history and eventually asked Downey for consent to search his vehicle. Downey declined to give consent. Deputy Clifton then asked Downey if he would consent to a canine sniff of the exterior of the vehicle. Again, Downey declined.

Deputy Clifton then called for a K-9 unit. The K-9 team arrived fourteen minutes after Deputy Clifton returned Downey's documentation and issued him the warning citation. A dog sniffed the exterior of the vehicle and alerted to the presence of drugs inside. Officers searched the vehicle and found a digital scale, several cellphones in the glove compartment, and a paper napkin containing approximately 3.2 grams of crack cocaine in the center console ashtray area.

On 6 September 2011, the State indicted Downey for possession with intent to sell and deliver cocaine, maintaining a place to keep

STATE v. DOWNEY

[251 N.C. App. 829 (2017)]

controlled substances, possession of drug paraphernalia, and attaining habitual felon status.

On 21 September 2012, Downey filed a motion to suppress all evidence obtained from his traffic stop. On 3 December 2012, the trial court held a hearing on Downey's motion to suppress and, on 31 December 2012, issued an order denying the motion.

Downey pleaded guilty but reserved his right to appeal the denial of his motion to suppress. He then timely appealed.

On 3 March 2015, in an unpublished opinion, this Court vacated the trial court's judgment and instructed the trial court on remand to determine whether Deputy Clifton had developed reasonable articulable suspicion of criminal activity before the officer returned Downey's documentation and issued the warning citation. *State v. Downey (Downey I)*, __ N.C. App. __, 771 S.E.2d 633 (2015) (unpublished).

On remand, both parties agreed that no further evidence was necessary for the court to determine the issue. On 16 September 2015, the trial court issued a new order denying Downey's motion to suppress. On 30 September 2015, Downey again pleaded guilty while reserving his right to appeal the denial of his motion to suppress and timely appealed.

Analysis

Downey argues that the trial court's findings on remand from this Court do not support its conclusion that the officer had reasonable suspicion to extend his traffic stop. We disagree.

"On review of a motion to suppress evidence, an appellate court determines whether the trial court's findings of fact are supported by the evidence and whether the findings of fact support the conclusions of law." *State v. Haislip*, 362 N.C. 499, 499, 666 S.E.2d 757, 758 (2008). "The trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting. The conclusions of law, however, are reviewed de novo." *Id.* at 500, 666 S.E.2d at 758.

When a law enforcement officer initiates a valid traffic stop, as happened here, the officer may not extend the duration of that stop beyond the time necessary to issue the traffic citation unless the officer has reasonable, articulable suspicion of some other crime. *State v. Bedient*, __ N.C. App. __, __, 786 S.E.2d 319, 323 (2016). This Court vacated and remanded the trial court's initial order denying Downey's motion to suppress for the trial court to make findings concerning whether the officer

STATE v. DOWNEY

[251 N.C. App. 829 (2017)]

had reasonable suspicion to extend the stop. *Downey I*, __ N.C. App. __, 771 S.E.2d 633.

On remand, the trial court made the following pertinent findings in support of its conclusion that the officer had reasonable suspicion:

16. Deputy Clifton formed the suspicion that Defendant was engaged in illegal drug activity at that time based on: Defendant's nervousness, rapid breathing, and lack of eye contact; the presence of the Black Ice air freshener in the BMW automobile Defendant was driving; the fact that the BMW was registered to a third person; the presence of the Boost prepaid cell phone in the BMW; Defendant's statements as to his reason for being in the area; and Defendant's admission that he had been arrested and imprisoned for possession of cocaine in the past.

17. At 2:45 p.m., Deputy Clifton issued a written warning citation to Defendant for driving left of the center line.

18. Deputy Clifton formed the suspicion that Defendant was engaged in illegal drug activity before he issued the written warning citation to Defendant and returned Defendant's driver's license and the vehicle registration card to Defendant.

Downey first challenges the trial court's finding concerning his nervousness during the traffic stop. Downey contends that the trial court failed to specify whether the nervousness on which the court relied occurred before or after the officer issued the citation. As explained below, we hold that the trial court's finding addressed Downey's nervousness before the officer issued the traffic citation, and that finding is supported by competent evidence in the record.

To be sure, the record indicates that Downey displayed significant nervousness throughout the encounter, including after the traffic stop concluded. But the trial court's reference to Downey's nervousness "at that time" in the relevant finding demonstrates that the court considered only nervousness evident before the officer issued the warning citation. The preceding paragraphs of the court's findings indicate that "at that time" referred to the time period "[w]hile preparing the warning citation." Moreover, the trial court's finding concerning nervousness is contained within a list of other factors—including the type of air freshener in the car, the third-party vehicle registration, and the prepaid

STATE v. DOWNEY

[251 N.C. App. 829 (2017)]

cellphone—all of which the officer observed before, and *only* before, issuing the citation.

Finally, in the initial appeal, this Court expressly instructed the trial court on remand to determine if reasonable suspicion existed *before* the officer issued the warning citation, citing applicable Fourth Amendment jurisprudence concerning extension of a traffic stop. This Court presumes that the trial court knows the law. *State v. Newson*, 239 N.C. App. 183, 195, 767 S.E.2d 913, 920 (2015). Thus, we are confident that the trial court’s finding addressed Downey’s nervousness before the traffic stop concluded, as this Court instructed in its mandate. *See id.*

Downey next argues that the record does not support the trial court’s finding of nervousness before the traffic stop concluded. Again, we disagree. The officer testified that Downey’s “hands were shaking as he handed [him] his documents, driver’s license and registration” and confirmed that timing later in his testimony:

Q. Deputy Clifton, you’ve testified that what you described in your testimony concerning that his hands were shaky and that he was breathing heavy, that was when you first approached the vehicle?

A. Yes, sir.

The officer also testified that, when Downey initially got into the officer’s patrol car, while the officer still was preparing to issue the citation, Downey “didn’t make eye contact and his breathing was elevated.” This testimony provides sufficient competent evidence to support the trial court’s finding that Downey exhibited nervous behavior before the traffic stop terminated. We are therefore bound by this finding, regardless of whether there is other, conflicting evidence in the record. *See Haislip*, 362 N.C. at 500, 666 S.E.2d at 758.

Finally, Downey argues that, even if the record supports the trial court’s findings concerning nervousness, all of the court’s findings, taken together, are insufficient to support its conclusion that the officer developed reasonable suspicion before the traffic stop ended. Once again, we disagree.

In addition to the trial court’s finding that Downey exhibited “nervousness, rapid breathing, and lack of eye contact” during the traffic stop, the trial court made a number of other, unchallenged findings concerning factors that contributed to the officer’s reasonable suspicion. The court found that Downey’s car had a specific brand of air freshener that the officer testified was “a trend that is involved in the drug

STATE v. DOWNEY

[251 N.C. App. 829 (2017)]

smuggling community” because of the strength of its odor. The court also found that Downey used a prepaid cellphone and was driving a car registered to a third party, both of which, in the officer’s experience and based on training he had received, were indicators of potential drug trafficking. The court also found that Downey admitted he had a previous drug conviction. Finally, the court found that the officer relied on “Defendant’s statements as to his reason for being in the area,” which the officer testified were vague and suspicious.

These six factors taken together—Downey’s nervous behavior, his use of a particular type of air freshener favored by drug traffickers, his prepaid cellphone, his use of a car registered to someone else, his suspicious responses to Deputy Clifton’s questioning, and his prior drug conviction—are sufficient to support the trial court’s conclusion that reasonable suspicion existed. *See State v. Castillo*, __ N.C. App. __, __, 787 S.E.2d 48, 55–56 (2016) (finding reasonable suspicion based on defendant’s unusual story regarding travel; a masking odor; third-party car registration; nervousness; and defendant’s prior drug convictions); *State v. Euceda-Valle*, 182 N.C. App. 268, 274–75, 641 S.E.2d 858, 863 (2007) (finding reasonable suspicion based on defendant’s nervousness; smell of air freshener coming from vehicle; vehicle not registered to occupants; occupants’ suspicious responses when questioned about travel plans); *see also United States v. Valenzuela-Rojo*, 139 F. Supp. 3d 1252, 1260 (D. Kan. 2015) (noting that “[t]he following may contribute to reasonable suspicion for extending a traffic stop: an officer’s knowledge that drug couriers frequently use rental cars; a motorist’s extreme nervousness”; “[s]trong odors” potentially “being used to mask the smell of drugs”; and the use of a type of cellphone that the officer “knows to be commonly used as [a] ‘burner’ phone[] in the drug trade”).

The dissent, citing *State v. Bullock*, __ N.C. App. __, __, 785 S.E.2d 746, 751, *writ of supersedeas allowed*, __ N.C. __, 786 S.E.2d 927 (2016), contends that “the tolerable duration of the traffic stop ended when Deputy Clifton communicated he was issuing Defendant a warning citation for the violation, not when Deputy Clifton actually issued the warning citation.” This is a misreading of *Bullock*. *Bullock* does not hold that, once an officer tells the defendant he will receive a citation and then returns to the patrol car to prepare it, the stop is over and the defendant is free to drive away without waiting to receive it. *Bullock* merely holds, as *Rodriguez v. United States*, __ U.S. __, 135 S. Ct. 1609 (2015) requires, that an officer may not delay issuing a traffic ticket (or warning citation), or delay returning a suspect’s driver’s license or registration, beyond the time reasonably necessary to complete the traffic stop:

STATE v. DOWNEY

[251 N.C. App. 829 (2017)]

Officer McDonough completed the mission of the traffic stop when he told defendant that he was giving defendant a warning for the traffic violations as they were standing at the rear of defendant's car. . . . *Officer McDonough was still permitted to check defendant's license and check for outstanding warrants.* But, he was not allowed to do so *in a way that prolong[ed] the stop*, absent the reasonable suspicion ordinarily demanded to justify detaining an individual.

Bullock, __ N.C. App. at __, 785 S.E.2d at 751 (second alteration in original) (emphasis added).

Here, the record does not contain any evidence that the officer delayed the preparation of the warning citation in order to further question Downey. Indeed, the video recording of the officer's interaction with Downey inside the patrol car appears to show him diligently preparing the warning citation as he questions Downey. And, in any event, this is not an argument Downey made, either in his appellate briefs or in the trial court; it is newly raised by the dissent. This Court does not address constitutional arguments not raised by a criminal defendant in his appellate briefing. *State v. Allen*, 360 N.C. 297, 308, 626 S.E.2d 271, 281 (2006).¹

The dissent also contends that all of the factors identified by the trial court are "consistent with innocent travel." That is certainly true. And any one of those factors, or perhaps even several together, might not be enough to constitute reasonable suspicion. But *all six* factors taken together are sufficient, as this Court and others repeatedly have held. *See Castillo*, __ N.C. App. at __, 787 S.E.2d at 55–56; *Euceda-Valle*, 182 N.C. App. at 274–75, 641 S.E.2d at 863; *Valenzuela-Rojo*, 139 F. Supp. 3d at 1260.

The reasonable suspicion test, by its nature, will rely on factors that are suspicious, but which could be associated with innocent behavior, as well as criminal behavior. *United States v. Sokolow*, 490 U.S. 1, 9–10 (1989). Were we to require otherwise, as the dissent suggests, reasonable suspicion would become synonymous with probable cause. Fourth Amendment jurisprudence distinguishes these two tests for a reason. *See Alabama v. White*, 496 U.S. 325, 329–31 (1990).

1. We also note that Downey has never asserted—either in this appeal or his previous appeal—that it was unconstitutional for the officer to instruct Downey to get out of his car and accompany the officer to the patrol car, where Downey could be questioned while the officer prepared the citation. So, again, this argument is waived. *See Allen*, 360 N.C. at 308, 626 S.E.2d at 281.

STATE v. DOWNEY

[251 N.C. App. 829 (2017)]

Thus, “the trial court’s findings support the conclusion that the officer had developed *reasonable suspicion* of illegal drug activity during the course of his investigation of the traffic offense and was therefore justified to prolong the traffic stop to execute the dog sniff.” *State v. Warren*, __ N.C. App. __, __, 775 S.E.2d 362, 365 (2015), *aff’d per curiam*, 368 N.C. 756, 782 S.E.2d 509 (2016). Accordingly, the trial court properly denied Downey’s motion to suppress.

Conclusion

We affirm the trial court.

AFFIRMED.

Judge McCULLOUGH concurs.

Judge HUNTER, JR. dissents by separate opinion.

HUNTER, JR., Robert N., Judge, dissenting in a separate opinion.

I respectfully dissent from the majority affirming the trial court’s denial of Defendant’s motion to suppress. Instead, I would reverse the trial court.

This Court recently addressed the tolerable duration of a traffic stop and the requirements to extend a traffic stop in *State v. Reed*, __ N.C. App. __, 791 S.E.2d 486 (2016). *See also State v. Bullock*, __ N.C. App. __, 785 S.E.2d 746 (2016), *writ of supersedeas allowed*, 786 S.E.2d 927 (2016); *State v. Bedient*, __ N.C. App. __, 786 S.E.2d 319 (2016). *Reed*, *Bullock*, and *Bedient* provided guidance to our courts based on the United States Supreme Court’s decision in *Rodriguez v. United States*, __ U.S. __, 191 L. Ed. 2d 492 (2015).

“[T]he tolerable duration of police inquires in the traffic-stop context is determined by the seizure’s ‘mission’—to address the traffic violation that warranted the stop, and attend to related safety concerns.” *Bedient*, __ N.C. App. at __, 786 S.E.2d at 322 (quoting *Rodriguez*, __ U.S. at __, 191 L. Ed. 2d at 498 (internal citations omitted) (brackets in original)). “In addition to deciding whether to issue a traffic ticket, a law enforcement officer’s ‘mission’ includes ‘ordinary inquires incident to the traffic stop.’” *Reed*, __ N.C. App. at __, 791 S.E.2d at 491 (quoting *Bedient*, __ N.C. App. at __, 791 S.E.2d at 322). “This inquiry typically includes checking the driver’s license, determining if the driver has any outstanding warrants, inspecting the vehicle’s registration and

STATE v. DOWNEY

[251 N.C. App. 829 (2017)]

proof of insurance . . .” *Id.* at ___, 791 S.E.2d at 491 (citing *Bedient*, ___ N.C. App. at ___, 786 S.E.2d at 322–23; *Bullock*, ___ N.C. App. at ___, 785 S.E.2d at 751). However, an officer is not allowed to conduct his inquiry “in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual.” *Rodriguez*, ___ U.S. at ___.

An officer has completed the mission of the traffic stop when the officer communicates he is giving a citation. *See Bullock*, ___ N.C. App. at ___, 785 S.E.2d at 751. To detain a driver beyond a traffic stop, an officer must have “reasonable articulable suspicion that illegal activity is afoot.” *State v. Williams*, 366 N.C. 110, 116, 726 S.E.2d 161, 166–67 (2012) (citing *Florida v. Royer*, 460 U.S. 491, 497–98, 75 L. Ed. 2d 229, 236 (1983)).

The trial court found “Deputy Clifton formed the suspicion that Defendant was engaged in illegal drug activity before he issued the written warning citation to Defendant and returned Defendant’s driver’s license and the vehicle registration card to Defendant.”

Here, the tolerable duration of the traffic stop ended when Deputy Clifton communicated he was issuing Defendant a warning citation for the violation, not when Deputy Clifton actually issued the warning citation. *See Bullock*, ___ N.C. App. at ___, 785 S.E.2d at 751. However, after Deputy Clifton communicated he was issuing the citation, he engaged Defendant in further conversation and questioned Defendant about Defendant’s criminal history. Further, Deputy Clifton asked Defendant for consent to search his vehicle. Deputy Clifton also asked Defendant if Defendant would consent to a canine sniff of the exterior of the vehicle. Lastly, Deputy Clifton called for a K-9 unit, which arrived *fourteen minutes* after Deputy Clifton issued Defendant’s citation and returned Defendant’s documentation. Thus, for the extension, which lasted *at least* fourteen minutes, to be constitutional, Deputy Clifton must have possessed reasonable articulable suspicion that illegal activity was afoot.

Here, the trial court’s findings do not support its conclusion that Deputy Clifton had reasonable suspicion of criminal activity to extend the traffic stop and conduct a search. The behaviors in the trial court’s findings do not amount to “reasonable suspicion that illegal activity is afoot.” *Williams*, 366 N.C. at 116, 726 S.E.2d at 166–67 (citation omitted). “In order to preserve an individual’s Fourth Amendment rights, it is of the utmost importance that we recognize that the presence of [a suspicious but legal behavior] is not, by itself, proof of any illegal conduct

STATE v. DOWNEY

[251 N.C. App. 829 (2017)]

and is often quite consistent with innocent travel.” *State v. Fields*, 195 N.C. App. 740, 745, 673 S.E.2d 765, 768 (2009) (citing *United States v. Sokolow*, 490 U.S. 1, 9, 104 L. Ed. 2d 1, 11 (1989)). Reasonable suspicion may arise from “wholly lawful conduct.” *Reid v. Georgia*, 448 U.S. 438, 441, 65 L. Ed. 2d 890(1980) (citation omitted). However, “the relevant inquiry is . . . the degree of suspicion that attaches to particular types of noncriminal acts.” *Sokolow*, 490 U.S. at 10, 104 L. Ed. 2d at 12 (citation omitted).

The majority relies on six factors in affirming the trial court—Defendant’s “nervous behavior, his use of a particular type of air freshener favored by drug traffickers, his prepaid cellphone, his use of a car registered to someone else, his [“]suspicious[”] responses to Deputy Clifton’s questioning, and his prior drug convictions” As held in *Reed*, “Defendant’s nervousness is ‘an appropriate factor to consider,’ but it must be examined ‘in light of the totality of the circumstances’ because ‘many people do become nervous when [they are] stopped by an officer’” ___ N.C. App. at ___, 791 S.E.2d at 493 (quoting *State v. McClendon*, 350 N.C. 630, 638, 517 S.E.2d 128, 134 (1999)) (brackets in original). The degree of suspicion attached to Defendant’s use of an air freshener, prepaid cellphone, and car registered to someone else is minimal, as it is consistent with innocent travel. *See id.* at ___, 791 S.E.2d at 493.

Notably, a case relied upon by the majority, *United States v. Valenzuela-Rojó*, 139 F. Supp. 3d 1252, 1260 (D. Kan. 2015), is not binding on this Court. Instead, we are bound by the decisions of the United States Supreme Court, the North Carolina Supreme Court, and our precedent. Moreover, *Valenzuela-Rojó* does not discuss or acknowledge the *Rodriguez* decision.

To affirm the trial court, as the majority does, fails to emphasize the United States Supreme Court’s direction in *Rodriguez* and our Court’s holding in *Reed*. I recognize that search and seizure cases are sui generis and reasonable jurists can disagree.

Accordingly, I would reverse the trial court.

STATE v. FRAZIER

[251 N.C. App. 840 (2017)]

STATE OF NORTH CAROLINA

v.

TARA MAY FRAZIER, DEFENDANT

No. COA 16-449

Filed 7 February 2017

Indictment and Information—indictment amendment—substantial alteration—negligent child abuse

The trial court committed reversible error in a negligent child abuse case by permitting the State to amend the indictment. The indictment amendment constituted a substantial alteration and alleged conduct that was not set forth in the original indictment.

Appeal by Defendant from judgment entered 8 October 2015 by Judge Michael D. Duncan in Randolph County Superior Court. Heard in the Court of Appeals 5 October 2016.

Attorney General Joshua H. Stein, by Assistant Attorney General Bethany A. Burgon, for the State.

Sean P. Vitrano for the Defendant.

DILLON, Judge.

Tara May Frazier (“Defendant”) appeals from the trial court’s judgment convicting her of negligent child abuse. For the following reasons, we vacate and remand.

I. Background

Defendant was indicted for negligent child abuse based on injuries discovered on her young child. A jury found Defendant guilty of the charge. The trial court entered judgment based on the jury verdict. Defendant timely appealed.

II. Standard of Review

We review a trial court’s ruling permitting amendment of an indictment *de novo*. See *State v. Brinson*, 337 N.C. 764, 767, 448 S.E.2d 822, 824 (1994).

III. Analysis

On appeal, Defendant contends that the trial court committed reversible error during the trial by permitting the State to amend the

STATE v. FRAZIER

[251 N.C. App. 840 (2017)]

indictment.¹ After careful review, we agree with Defendant for the reasons stated below. Accordingly, we vacate the judgment and remand the matter to the trial court for further proceedings not inconsistent with this opinion.

Defendant was indicted for negligent child abuse under N.C. Gen. Stat. § 14-318.4(a5) (2015) after Asheboro police discovered her unconscious in her apartment with track marks on her arms and her nineteen-month old child exhibiting signs of physical injury. Under § 14-318.4(a5), a parent of a young child is guilty of negligent child abuse if the parent's "willful act or grossly negligent omission in the care of the child shows a reckless disregard for human life" *and* the parent's act or omission "results in serious bodily injury to the child." N.C. Gen. Stat. § 14-318.4(a5).

The indictment here alleged the following:

[T]he defendant named above unlawfully, willfully and feloniously did

show a reckless disregard for human life by committing a grossly negligent omission, by not treating a burn on the victim's chest, a scratch on the lower left side of chest, a laceration on right side of jaw, a scratch on left eye brow, and an abrasion to the lower lip of [the child] . . . , who was 19 months old and thus under 16 years of age. The defendant's omission resulted in serious physical injury to the child. At the time the defendant committed the offense, the defendant was the child's parent.

Put simply, the indictment alleges that Defendant committed negligent child abuse because: (1) she negligently failed to treat her child's chest and facial wounds; (2) her failure caused these wounds to worsen; and (3) the resulting aggravation of these wounds caused the child to suffer serious bodily injury. During the trial, however, the State moved to amend the indictment "to include failure to provide a safe environment as the grossly negligent omission as well," in order to better reflect the evidence presented at trial.

The General Assembly has provided that a "bill of indictment may not be amended." N.C. Gen. Stat. § 15A-923(e) (2015). However, our

1. Defendant has raised additional arguments on appeal. However, as the indictment amendment constitutes reversible error, we need not reach these other arguments.

STATE v. FRAZIER

[251 N.C. App. 840 (2017)]

Supreme Court has construed this provision as only prohibiting changes “which would substantially alter the charge set forth in the indictment.” *State v. Price*, 310 N.C. 596, 598, 313 S.E.2d 556, 558 (1984) (internal quotation marks omitted). *See also State v. Silas*, 360 N.C. 377, 379–80, 627 S.E.2d 604, 606 (2006). This rule helps ensure that “the accused [is able] to prepare for trial.” *Silas*, 360 N.C. at 380, 627 S.E.2d at 606 (internal quotation marks omitted). Thus, an amendment sought by the State at trial which alleges conduct by the defendant not previously alleged and which touches on an essential element of the charged crime would be a substantial, and therefore prohibited, alteration. *See* N.C. Gen. Stat. § 15A-924(a)(5) (stating that a criminal pleading—which includes an indictment—must contain a “concise factual statement” that “asserts facts supporting every element of a criminal offense” to apprise the defendant “of the conduct which is the subject of the accusation”). A defendant is entitled to a dismissal if the State attempts to substantially alter an indictment because of a “fatal variance” between the original indictment and the evidence presented at trial. *State v. Overman*, 257 N.C. 464, 468, 125 S.E.2d 920, 924 (1962).

For example, in a previous felony child abuse case, we have held that there was no fatal variance between an indictment alleging that the defendant’s conduct caused a *subdural* hematoma and trial evidence establishing that the defendant’s alleged conduct caused an *epidural* hematoma. *State v. Qualls*, 130 N.C. App. 1, 8, 502 S.E.2d 31, 36 (1998), *aff’d*, 350 N.C. 56, 510 S.E.2d 376 (1999). Specifically, we reasoned that though serious bodily injury was an essential element, an allegation regarding the *location* of the injury was “surplusage” and therefore not necessary in charging the offense. *Id.*

In the present case, we conclude that the indictment amendment granted by the trial court constituted a substantial alteration. The amendment alleged conduct that was not set forth in the original indictment and which constituted Defendant’s “willful act or grossly negligent omission,” an essential element of the negligent child abuse charge. In the original indictment, the State alleged that Defendant’s negligent omissions consisted of *her failure to treat the child’s pre-existing chest and facial wounds*. These omissions occurred *after* the wounds had already been inflicted on the child. The amendment granted at trial, however, alleged that Defendant *failed to provide a safe environment*: an omission that occurred *prior* to her child incurring the wounds. Under this new theory, the jury could convict based on a finding that Defendant’s failure to provide a safe living environment for her child was the cause

STATE v. FRAZIER

[251 N.C. App. 840 (2017)]

of her child's wounds in the first instance, irrespective of whether she attempted to treat the wounds after they had been inflicted.²

Admittedly, the amendment sought by the State may seem minor. However, since the amendment allowed the jury to convict Defendant of conduct not alleged in the original indictment and found by the grand jury, we must vacate the judgment against her. In addition to violating N.C. Gen. Stat. § 15A-923(e), the indictment amendment was prohibited under the Declaration of Rights contained in our North Carolina Constitution, which requires the grand jury to indict and the petit jury to convict for offenses charged by the grand jury. N.C. CONST. art. I, § 22 (amended 1971). As our Supreme Court has explained, "[t]hese principles are dear to every [citizen]; they are his shield and buckler against wrong and oppression, and lie at the foundation of civil liberty; they are declared to be [rights] of the citizens of North Carolina, and ought to be vigilantly guarded." *State v. Moss*, 47 N.C. 66, 68 (1854). "Every [citizen] . . . has a right to the decision of twenty-four of his fellow-citizens upon the question of his guilt; first, by a grand jury, and secondly, by a petty jury of good and lawful [citizens]." *Id.* at 69.

IV. Conclusion

As the trial court committed reversible error by permitting the State to amend the indictment, we vacate the judgment and remand the matter to the trial court for further proceedings not inconsistent with this opinion.

VACATED AND REMANDED.

Judges ELMORE and HUNTER, JR., concur.

2. As Defendant notes in her brief, the jury verdict form did not provide jurors an option to indicate under what theory they were convicting Defendant.

STATE v. GLISSON

[251 N.C. App. 844 (2017)]

STATE OF NORTH CAROLINA

v.

DEBORAH LYNN GLISSON, DEFENDANT

No. COA16-426

Filed 7 February 2017

1. Appeal and Error—preservation of issues—general motion to dismiss—one aspect of evidence argued

The question of the sufficiency of evidence of conspiracy to traffic in opium (oxycodone) was preserved for appellate review where counsel made a general motion to dismiss all charges at trial but only argued a single aspect of the evidence.

2. Conspiracy—trafficking in opium—person accompanying defendant

The evidence, though circumstantial, was sufficient to withstand defendant's motion to dismiss a charge of conspiracy to traffic in opium (oxycodone). It would be reasonable for the jury to infer that the person who accompanied defendant to the transactions was present at defendant's behest to provide safety and comfort to defendant during the transaction.

3. Conspiracy—trafficking in opium—multiple transactions

The evidence in the record supported charges of multiple conspiracies to traffic in opium (oxycodone) even though defendant contended that the evidence showed multiple transactions indicating one conspiracy. The evidence was sufficient to support a reasonable inference that defendant and a coconspirator planned each transaction in response to separate, individual requests by the buyers and completed each plan upon the transfer of money for oxycodone.

Appeal by Defendant from judgment entered 12 September 2014 by Judge Kenneth F. Crow in Jones County Superior Court. Heard in the Court of Appeals 2 November 2016.

Attorney General Joshua H. Stein, by Assistant Attorney General David D. Lennon, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katherine Jane Allen, for Defendant-Appellant.

STATE v. GLISSON

[251 N.C. App. 844 (2017)]

INMAN, Judge.

Deborah Lynn Glisson (“Defendant”) appeals from a judgment finding her guilty of, *inter alia*, felonious conspiracy to traffic opium by sale and delivery and possession of oxycodone with intent to sell and deliver. Defendant contends the trial court erred by denying her motion to dismiss the conspiracy charge related to the controlled buy on 13 September 2012 for insufficiency of the evidence. After careful review, we hold that Defendant has failed to demonstrate error.

I. Factual and Procedural History

Defendant was indicted on 5 August 2013, 28 April 2014, and 4 August 2014 for eighteen drug-related offenses arising from three separate controlled buys arranged by the Jones County Sheriff’s Office between August and December 2012. The evidence at trial tended to show the following:

On or about August 2012, an informant with the Jones County Sheriff’s Office contacted Detective Timothy Corey (“Detective Corey”) and informed him that a couple, believed to be husband and wife, were selling oxycodone. At Detective Corey’s direction, the informant arranged for a controlled buy from Defendant.

On 16 August 2012, Detective Corey and the informant met Defendant, who was accompanied by James Adkins (“Adkins”), in a parking lot in Pottersville, North Carolina. Defendant and Adkins arrived in a Ford Focus, which Defendant was driving. Defendant exited the Ford and walked over to the informant’s vehicle to talk with him. The informant introduced Detective Corey as a family member from out of town who wanted to buy oxycodone. After a short conversation, Detective Corey requested oxycodone and paid Defendant \$140. Defendant then turned to the passenger side front seat of the Ford and spoke with Adkins, who produced a pill bottle. Defendant counted out a number of pills and gave them to Detective Corey. The pills were later confirmed to be oxycodone.

Detective Corey and the informant then arranged for a second controlled buy from Defendant. On or about 13 September 2012,¹ Detective Corey met the informant in an unfinished subdivision, and shortly thereafter, at dusk, Defendant and Adkins arrived in the same Ford Focus Defendant had driven to the initial controlled buy. Defendant told

1. There were several errors made at trial as to the date of the second controlled buy. However, defense counsel raised no objections and did not offer an alibi defense for the events of 13 September 2012 or any of the other mistaken dates.

STATE v. GLISSON

[251 N.C. App. 844 (2017)]

Detective Corey that she did not like the meeting location “because it’s a subdivision that, you know, she don’t know where anybody is coming from.” Defendant gave Detective Corey twenty oxycodone pills in exchange for \$80.

Detective Corey set up a third controlled buy to take place on 7 December 2012 in the same unfinished subdivision as the second controlled buy. Defendant told Detective Corey that she had to pick up Adkins before the meeting. Detective Corey met Defendant and Adkins and paid Defendant \$200. Adkins then handed Detective Corey thirty-four oxycodone pills. Defendant was arrested immediately after delivering the pills to Detective Corey.

At the close of the State’s evidence, Defendant made an oral motion to dismiss on all charges. Defendant’s trial counsel argued that the State’s evidence and testing methods were insufficient to satisfy the minimum weight requirement element for the charge of trafficking opium. The trial court dismissed one trafficking in opium by possession charge and reduced the other two charges from trafficking in opium to sale and delivery of opium. Defendant chose not to testify and presented no evidence. Her counsel renewed her general motion to dismiss all remaining charges based on the insufficiency of the evidence. The trial court denied the motion to dismiss. Following a meeting with counsel in chambers, the trial court dismissed the trafficking allegations in the conspiracy charges, reducing those charges to conspiracy to sell opium, conspiracy to deliver opium, and conspiracy to possess with intent to sell or deliver opium. The trial court reviewed the jury instructions with Defendant’s trial counsel, who agreed with the proposed instructions regarding each conspiracy charge.

The jury returned a guilty verdict on all remaining charges, except that the jury found the lesser included offense of knowingly (rather than intentionally) maintaining a motor vehicle to possess and sell oxycodone on the dates of all three transactions. Defendant gave oral notice of appeal.

II. Analysis

On appeal, Defendant challenges the sufficiency of the evidence for the charge of felonious conspiracy to traffic opium by sale and delivery and possession of oxycodone with intent to sell and deliver related to the events of the second controlled buy on 13 September 2012. Defendant contends the State failed to present evidence, aside from Adkins’s mere presence at the transaction on 13 September 2012, that Defendant conspired with Adkins to traffic opium on that date.

STATE v. GLISSON

[251 N.C. App. 844 (2017)]

A. Appellate Jurisdiction

[1] The State first contends that Defendant failed to preserve this issue for appeal because her counsel argued before the trial court only that the State had presented insufficient evidence of the weight of the pills involved in each transaction. We disagree, based upon the record before us and our precedent holding that a general motion to dismiss for insufficiency of the evidence preserves all issues regarding the insufficiency of the evidence, even those issues not specifically argued before the trial court. *State v. Pender*, ___ N.C. App. ___, 776 S.E.2d 352, 360 (2015) (holding that although trial counsel presented a specific argument addressing only two elements of two charges, the defendant's general motion to dismiss "preserved his insufficient evidence arguments with respect to all of his convictions,"); *State v. Mueller*, 184 N.C. App. 553, 559, 647 S.E.2d 440, 446 (2007) (holding that although trial counsel presented a specific argument addressing only five charges, the defendant's general motion to dismiss preserved arguments regarding fourteen charges on appeal).

Defendant's motion to dismiss required the trial court to consider whether the evidence was sufficient to support each element of each charged offense. *State v. Nabors*, 365 N.C. 306, 312, 718 S.E.2d 623, 626 (2011). The trial court acknowledged Defendant's contention that the State "simply failed to offer sufficient evidence on each and every count as to justify these cases to survive a motion to dismiss." The trial court referred to the motion as "global" and "prophylactic," acknowledging on the record that Defendant's motion was broader than the single oral argument presented. In ruling on the motion to dismiss, the trial court stated that "the State has offered sufficient evidence on each and every element of all the surviving charges to justify these cases being advanced to the jury." Counsel's oral argument challenging a single aspect of the evidence does not preclude Defendant from arguing other insufficiencies in the evidence on appeal. So we will address the merits of Defendant's argument challenging the sufficiency of the evidence to support the conspiracy charge.

B. Standard of Review

A trial court, on a motion to dismiss for insufficient evidence, "must determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992) (citation omitted). "Whether evidence presented constitutes substantial evidence is a question of law for the court" and is reviewed *de novo*. *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991) (citation

STATE v. GLISSON

[251 N.C. App. 844 (2017)]

omitted). “Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.” *Olson*, 330 N.C. at 564, 411 S.E.2d at 595 (citation omitted). In reviewing the denial of a motion to dismiss for insufficiency of the evidence, “we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences.” *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992) (citation omitted). “Any contradictions or discrepancies in the evidence are for the jury to resolve and do not warrant dismissal.” *Olson*, 330 N.C. at 564, 411 S.E.2d at 595 (citation omitted).

C. Sufficiency of the Evidence

[2] “A criminal conspiracy is an agreement between two or more people to do an unlawful act or to do a lawful act in an unlawful way.” *State v. Bell*, 311 N.C. 131, 141, 316 S.E.2d 611, 617 (1984) (citation omitted). To prove the crime of conspiracy, “the State need not prove an express agreement;” rather, “evidence tending to show a mutual, implied understanding will suffice.” *State v. Morgan*, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991) (citation omitted). “The existence of a conspiracy may be established by direct or circumstantial evidence, although it is generally established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy.” *State v. Worthington*, 84 N.C. App. 150, 162, 352 S.E.2d 695, 703 (1987) (internal quotation marks and citations omitted). “In ‘borderline’ or close cases, our courts have consistently expressed a preference for submitting issues to the jury, both in reliance on the common sense and fairness of the twelve and to avoid unnecessary appeals.” *State v. Hamilton*, 77 N.C. App. 506, 512, 335 S.E.2d 506, 510 (1985) (citations omitted).

Here, the State presented evidence of indefinite acts amounting to substantial evidence that Defendant conspired with Adkins to traffic opium on 13 September 2012. Defendant brought Adkins in her vehicle to the unfinished subdivision just as she had brought Atkins with her for the initial transaction with Detective Corey, and just as she would bring Adkins with her again for the third transaction in December. The area of the exchange was one Defendant did not like and the sale took place at or near dark. The drugs were maintained in the same vehicle as Adkins, and Defendant exchanged the drugs and counted the money in front of him. From this, it would be reasonable for the jury to infer that Adkins was present at Defendant’s behest to provide safety and comfort to Defendant during the transaction. *See State v. Jackson*, 103 N.C. App. 239, 244, 405 S.E.2d 354, 357 (1991) (“[I]t is reasonable for the jury to infer that the defendant was present merely to ensure the

STATE v. GLISSON

[251 N.C. App. 844 (2017)]

safety of the cocaine. This evidence, while circumstantial in nature . . . allowed the state to withstand the defendant's motion to dismiss [a conspiracy charge.]). This evidence was sufficient for the State to withstand Defendant's motion to dismiss.

D. Single Conspiracy

[3] Defendant argues that evidence of Adkins' participation in the other two transactions cannot be considered to support the separate conspiracy charge related to the 13 September 2012 transaction, but instead establishes a single conspiracy to engage in three transactions, so that Defendant could be convicted of only one conspiracy charge. We disagree.

"There is no simple test for determining whether single or multiple conspiracies are involved: the essential question is the nature of the agreement or agreements, . . . factors such as time intervals, participants, objectives, and number of meetings all must be considered." *State v. Rozier*, 69 N.C. App. 38, 52, 316 S.E.2d 893, 902 (1984). By electing to charge separate conspiracies, the State "must prove not only the existence of at least two agreements but also that they were separate." *Id.* at 53, 316 S.E.2d at 902 (citation omitted). "Although the offense of conspiracy is complete upon formation of the unlawful agreement, the offense continues until the conspiracy comes to fruition or is abandoned." *State v. Medlin*, 86 N.C. App. 114, 122, 357 S.E.2d 174, 179 (1987) (citation omitted). Ultimately, "[t]he question of whether multiple agreements constitute a single conspiracy or multiple conspiracies is a question of fact for the jury." *State v. Tirado*, 358 N.C. 551, 577, 599 S.E.2d 515, 533 (2004) (citing *Rozier*, 69 N.C. App. at 54, 316 S.E.2d at 903).

Here, the evidence in the record, including the evidence from the other two controlled buys, supports the existence of multiple separate conspiracies. Approximately one month passed between the first and second controlled buys, and approximately three months passed between the second and third controlled buys. There was no evidence to suggest that Defendant planned the transactions as a series. Rather, the informant or Detective Corey initiated each transaction. The evidence was sufficient to support a reasonable inference that Defendant and Atkins planned each transaction in response to separate, individual requests by the buyers and completed each plan upon the transfer of money for oxycodone. While the objectives of each controlled buy may have been similar—to purchase oxycodone—the agreed upon amount differed and none of the transactions contemplated future transactions.

STATE v. McLEAN

[251 N.C. App. 850 (2017)]

In light of the foregoing, we conclude that the evidence in the record supports the charges of multiple conspiracies. We hold that Defendant has not met her burden of establishing that the trial court erred in denying her motion to dismiss for insufficiency of the evidence on the multiple conspiracy charges.

III. Conclusion

For the above mentioned reasons, we hold the trial court did not err by denying Defendant's motion to dismiss and submitting to the jury the charge of conspiracy to traffic a Schedule II controlled substance as related to the 13 September 2012 transaction.

NO ERROR.

Chief Judge McGEE and Judge DAVIS concur.

STATE OF NORTH CAROLINA

v.

JAMES McLEAN

No. COA16-484

Filed 7 February 2017

1. Indictment and Information—discharging a firearm within an enclosure—improperly worded

An indictment was insufficient to confer jurisdiction where it attempted to charge defendant with discharging a firearm *within* an enclosure to incite fear, N.C.G.S. § 14-34.10, but instead alleged that defendant discharged a firearm *into* an occupied structure.

2. Robbery—sufficiency of evidence—taking of property

The trial court did not err by denying defendant's motion to dismiss a charge of robbery with a dangerous weapon where there was substantial evidence that defendant took personal property from the victim's person or presence.

3. Evidence—officer vouching for witness—not prejudicial

There was error, but not plain error, in a prosecution for armed robbery and other offenses where an officer testified that the victim "seemed truthful." The officer vouched for the veracity of the witness, but there was no prejudice in light of other corroborating evidence.

STATE v. McLEAN

[251 N.C. App. 850 (2017)]

4. Evidence—hearsay—what a jailer told the witness—not offered to prove the truth of the matter—no prejudice

There was no error in a prosecution for armed robbery and other offenses where a witness testified that a jailer had told her that defendant was in the jail cell next to hers. The challenged testimony was not offered to prove the truth of the matter asserted but to explain why the witness was afraid to testify. Even if the testimony amounted to hearsay, there was no plain error in light of substantial evidence of defendant's guilt.

5. Sentencing—early release condition—payment of State's expert witness expenses—no authority

The trial court erred in a prosecution for armed robbery and other offenses by requiring defendant, as a condition of early release or post-release supervision, to pay the expenses of the State's expert witness. There did not appear to be any statutory authority for the requirement.

Appeal by defendant from judgments entered 15 October 2015 by Judge James M. Webb in Scotland County Superior Court. Heard in the Court of Appeals 20 October 2016.

Attorney General Joshua H. Stein, by Assistant Attorney General Kenneth Sack, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Anne M. Gomez, for defendant-appellant.

McCULLOUGH, Judge.

James McLean ("defendant") appeals from judgments entered upon his convictions of assault with a deadly weapon inflicting serious injury, robbery with a dangerous weapon, and discharging a firearm from within a building with the intent to incite fear. On appeal, defendant argues that judgment entered upon his conviction for discharging a firearm within a building with the intent to incite fear must be vacated, the trial court erred by denying his motion to dismiss the robbery with a dangerous weapon charge, the trial court erred by allowing Lieutenant Jason Butler to vouch for the credibility of a victim, the trial court erred by allowing Shaquana McInnis to provide testimony amounting to inadmissible hearsay, and the trial court erred by assessing a fee against defendant to pay for the State's expert witness. For the reasons stated herein, we hold no error in part and vacate in part.

STATE v. McLEAN

[251 N.C. App. 850 (2017)]

I. Background

On 27 October 2014, defendant was indicted for the following: attempted first degree murder in violation of N.C. Gen. Stat. § 14-17; assault with a deadly weapon with intent to kill inflicting serious injury in violation of N.C. Gen. Stat. § 14-32(a); robbery with a dangerous weapon in violation of N.C. Gen. Stat. § 14-87; and, discharging a firearm within an enclosure to incite fear in violation of N.C. Gen. Stat. § 14-34.10.

Defendant's trial commenced at the 12 October 2015 criminal session of Scotland County Superior Court, the Honorable James M. Webb presiding. The State's evidence tended to show as follows: On 25 April 2014, approximately nine people, including the State's witnesses Rodrigues McRae ("McRae"), Vincent Smith ("Smith"), John Shaw ("Shaw"), Acey Braddy ("Braddy"), and Shaquana McInnis ("McInnis"), were playing cards in a cinder-block building behind a residence located at 508 Morris Street in Laurinburg, North Carolina. Sometime between 3:00 and 4:00 a.m., four individuals, each armed, entered the building. Three of the intruders had on masks and one was unmasked. The unmasked man said, "Don't move[]" and "Y'all killed my brother. I'm going to terrorize you Laurinburg mother****ers[.]" The unmasked man then fired two shots. Braddy was shot in his chest and said "Man, you shot me. You shot me." McRae and Braddy identified the unmasked shooter who shot Braddy as defendant.

Defendant ordered everyone to "get facedown on the ground and take our clothes off[]" and then said, "Give me all your money." Braddy testified that the three masked intruders "just stood like soldiers[]" while defendant "did everything by hisself [sic]." McRae testified that "I just took my pants and my wallet and everything, and my keys and my cell phone, and just gave it all to them." The following items were taken from the State's witnesses: a cell phone and twenty dollars from Smith; \$800.00 from Shaw; a cell phone and money from Braddy; and "a couple hundred dollars" from McInnis. The testimony from Smith, Shaw, and McInnis corroborated Braddy and McRae's testimony.

Lieutenant Jason Butler ("Lieutenant Butler") from the Laurinburg Police Department testified that in the early morning hours of 26 April 2014, he was dispatched to Scotland Memorial Hospital in reference to a gunshot wound. Lieutenant Butler was directed to a trauma room where he interviewed Braddy. Braddy had suffered a single gunshot wound. Braddy informed Lieutenant Butler that he was playing cards with several people when four people ran into the room, three of them wearing masks, and one of them made the statement, "Y'all killed my brother.

STATE v. McLEAN

[251 N.C. App. 850 (2017)]

I'm going to terrorize you n***** in Laurinburg.” Braddy stated that the intruders ordered them “to take their clothes off and lay on the ground, where some cash and cell phones and things like that were taken from them.” As the intruders were exiting, Braddy heard a gunshot and felt pain in his back. Braddy told Lieutenant Butler that the unmasked person was “the brother of Chris McKoy.” Lieutenant Butler testified that Braddy “was agitated and seemed to be in some pain. But he was – to me, he seemed truthful.”

Officer Merica Zabitosky (“Officer Zabitosky”), who was employed with the City of Laurinburg, interviewed Braddy later that morning on 26 April 2014. Braddy identified defendant as the masked shooter, gave a description of defendant’s appearance, and stated that defendant “[l]ook[ed] just like his brother Chris McKoy[.]”

At trial, McInnis testified that after the robbery, she was incarcerated. While in a holding cell with a few other females, she heard one of the females having a conversation with a man in a nearby cell. The man wanted to know the identity of all the females in the cell. McInnis provided her name and the man said through the cell wall, “You wrote a statement against me[.]” McInnis testified that she recognized the voice as that of the unmasked shooter from the 26 April 2014 robbery. McInnis responded that she did not write a statement and the male voice said “that they were going to put him in a cell with me, and ‘We’ll see what you say then.’ ” McInnis testified that she asked the jailer whether “James McLean” was in there and “she did say he was in there.” McInnis testified that because of this incident, she was scared to testify.

On 15 October 2015, a jury found defendant not guilty of attempted first degree murder. The jury found defendant guilty of assault with a deadly weapon inflicting serious injury, robbery with a firearm, and discharging a firearm from within a building with the intent to incite fear.

Defendant was sentenced as a prior record level IV to 38 to 58 months for his assault with a deadly weapon inflicting serious injury conviction, 97 to 129 months for his robbery with a dangerous weapon conviction, and 25 to 39 months for discharging a firearm from within a building with the intent to incite fear conviction.

Defendant appeals.

II. Discussion

Defendant presents five issues on appeal. We address each in turn.

STATE v. McLEAN

[251 N.C. App. 850 (2017)]

A. Discharging a Firearm Within an Enclosure to Incite Fear

[1] In his first argument on appeal, defendant contends that the judgment entered upon his conviction for discharging a firearm *within* an enclosure to incite fear must be vacated because the indictment was insufficient to charge defendant with that crime. The State concedes and we agree.

“This Court reviews the sufficiency of an indictment *de novo*.” *State v. Mann*, 237 N.C. App. 535, 539, 768 S.E.2d 138, 141 (2014). “[A] valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony.” *State v. Miranda*, 235 N.C. App. 601, 605, 762 S.E.2d 349, 353 (2014) (citation omitted). “An indictment for a statutory offense is sufficient, as a general rule, when it charges the offense in the language of the statute.” *State v. Penley*, 277 N.C. 704, 707, 178 S.E.2d 490, 492 (1971).

Here, the “discharging a firearm within enclosure to incite fear” indictment charged that “defendant named above unlawfully, willfully and feloniously did discharge a handgun, a firearm, *into* an occupied structure with the intent to incite fear in others. This act was in violation of North Carolina General Statutes Section *14-34.10*.” (emphasis added).

N.C. Gen. Stat. § 14-34.10, entitled “Discharge firearm within enclosure to incite fear[,]” provides that “any person who willfully or wantonly discharges or attempts to discharge a firearm *within* any occupied building, structure, motor vehicle, or other conveyance, erection, or enclosure with the intent to incite fear in another shall be punished as a Class F felon.” N.C. Gen. Stat. § 14-34.10 (2015) (emphasis added). N.C. Gen. Stat. § 14-34.1, entitled “Discharging certain barreled weapons or a firearm into occupied property[,]” provides that

[a]ny person who willfully or wantonly discharges or attempts to discharge any firearm or barreled weapon capable of discharging shot, bullets, pellets, or other missiles at a muzzle velocity of at least 600 feet per second into any building, structure, vehicle, aircraft, watercraft, or other conveyance, device, equipment, erection, or enclosure while it is occupied is guilty of a Class E felony.

N.C. Gen. Stat. § 14-34.1(a) (2015) (emphasis added).

The indictment in question attempted to charge defendant of violating N.C. Gen. Stat. § 14-34.10 but failed to accurately and sufficiently charge that offense. Instead, the indictment alleged that defendant discharged a firearm “into” an occupied structure. As such, we hold that the

STATE v. McLEAN

[251 N.C. App. 850 (2017)]

indictment was insufficient to confer jurisdiction upon the trial court. Defendant's judgment entered upon his conviction for discharging a firearm from within a building with the intent to incite fear is vacated.

B. Robbery with a Dangerous Weapon

[2] In the second issue on appeal, defendant contends that the trial court erred by denying his motion to dismiss the robbery with a dangerous weapon charge. Specifically, defendant argues that there was insufficient evidence that he committed a taking from Braddy's person or presence. We disagree.

Our Court reviews *de novo* the trial court's motion to dismiss. *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007). "A trial court should deny a motion to dismiss if, considering the evidence in the light most favorable to the State and giving the State the benefit of every reasonable inference, there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Lawson*, 194 N.C. App. 267, 278, 669 S.E.2d 768, 775-76 (2008) (internal quotation marks and citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991) (citation and quotation marks omitted).

The elements of robbery with a dangerous weapon are: (1) the unlawful *taking* or an attempt to take personal property *from the person or in the presence of another* (2) by use or threatened use of a firearm or other dangerous weapon (3) whereby the life of a person is endangered or threatened.

State v. Hill, 365 N.C. 273, 275, 715 S.E.2d 841, 843 (2011) (citation and internal quotation marks omitted) (emphasis added). Our Court has stated that:

[t]he word "presence" . . . must be interpreted broadly and with due consideration to the main element of the crime—intimidation or force by the use or threatened use of firearms. "Presence" here means a possession or control by a person so immediate that force or intimidation is essential to the taking of the property.

State v. Cole, 199 N.C. App. 151, 156, 681 S.E.2d 423, 427 (2009) (citation omitted).

STATE v. McLEAN

[251 N.C. App. 850 (2017)]

To establish that defendant took personal property from Braddy's person or presence, the State presented the following evidence: Four intruders, three masked and one unmasked, entered a cinderblock building in the early morning hours of 25 April 2014. All four men were armed. McRae and Braddy identified the unmasked shooter who shot Braddy as defendant. McRae testified that defendant, as well as others, were ordering the occupants of the building to "get facedown on the ground and take our clothes off." McRae testified that defendant said, "Get butt-a** naked. Give me all your money." Braddy testified that "Mr. McLean did everything by hisself [sic][]" while the other three intruders "just stood like soldiers." Braddy further testified that "everybody got robbed. A few people got their clothes took off. He took cell phones." In addition, the following exchange occurred:

[THE STATE:] When you were laying there on the ground, was anything taken from you as far as property?

[BRADDY:] My cell phone.

[THE STATE:] Anything else?

[BRADDY:] No. The money had been tooaken [sic].

Viewing the foregoing evidence in the light most favorable to the State, we hold that there was substantial evidence that defendant took personal property from Braddy's person or presence. *See State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988) ("If there is substantial evidence — whether direct, circumstantial, or both — to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.") (citation omitted). Accordingly, the trial court did not err by denying defendant's motion to dismiss the robbery with a dangerous weapon charge.

C. Testimony of Lieutenant Jason Butler

[3] In the third issue on appeal, defendant argues that the trial court committed plain error by allowing Lieutenant Butler to testify that Braddy "seemed truthful" and that he felt Braddy wanted police to find the perpetrator. Defendant contends that Lieutenant Butler's testimony constituted an opinion which tended to vouch for the credibility of Braddy.

On 26 April 2014, Lieutenant Butler interviewed Braddy at the hospital. Defendant challenges the following exchange between the State and Lieutenant Butler:

STATE v. McLEAN

[251 N.C. App. 850 (2017)]

Q. Okay. Generally, what was Mr. Braddy's demeanor like when he was talking to you?

A. He was agitated and seemed to be in some pain. But he was - to me, he seemed truthful. I mean, I think he wanted - I felt that he wanted me to - or us, the police department, to find the people that had injured him.

We first note that because defendant failed to object to the admission of this testimony, "the proper standard of review is a plain error analysis[.]" *State v. Gary*, 348 N.C. 510, 518, 501 S.E.2d 57, 63 (1998).

[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation omitted).

Rule 701 of the North Carolina Rules of Evidence provides that "[i]f the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2015). Our Courts have held that "when one witness vouch[es] for the veracity of another witness, such testimony is an opinion which is not helpful to the jury's determination of a fact in issue and is therefore excluded by Rule 701." *State v. Global*, 186 N.C. App. 308, 318, 651 S.E.2d 279, 286 (2007) (citation and internal quotation marks omitted).

In the present case, Lieutenant Butler testified that Braddy "seemed truthful[.]" This was an opinion that vouched for the veracity of another witness. The jury had the opportunity to make an independent determination of Braddy's veracity when Braddy testified at trial. Therefore, Lieutenant Butler's opinion of Braddy's veracity was not helpful to the

STATE v. McLEAN

[251 N.C. App. 850 (2017)]

jury and admission of this testimony amounted to error. However, we conclude that it did not amount to plain error given the testimony from four other witnesses, McRae, Smith, Shaw, and McInnis, which corroborated Braddy's testimony.

D. Testimony of Shaquana McInnis

[4] In the fourth issue on appeal, defendant argues that the trial court committed plain error by allowing Shaquana McInnis to testify that after the 25 April 2014 incident, while she was incarcerated, a jailer told her that defendant was in a jail cell adjacent to hers. Defendant argues that because the jailer did not testify at trial and her testimony was offered for the truth of the matter asserted, that defendant was in the holding cell, McInnis' testimony amounted to inadmissible hearsay.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1(a), Rule 801 (2015). Generally, hearsay evidence is inadmissible. *State v. Valentine*, 357 N.C. 512, 515, 591 S.E.2d 846, 851 (2003). However, "[o]ut-of-court statements offered for purposes other than to prove the truth of the matter asserted are not considered hearsay." *State v. Castaneda*, 215 N.C. App. 144, 147, 715 S.E.2d 290, 293 (2011) (citation omitted).

At trial, McInnis testified that she was afraid to give a formal written statement to police and to testify. She explained that she was afraid to testify because of an incident that occurred previously. While incarcerated and in a holding cell with other females, McInnis heard one of the women having a conversation with a man in an adjacent cell. The man wanted to know the identity of all the women. McInnis provided her name and the man said through the cell wall, "You wrote a statement against me[.]" McInnis testified that she recognized the voice as that of the unmasked shooter from the 26 April 2014 robbery. McInnis responded by denying that she wrote a statement and the male voice replied "that they were going to put him in a cell with me, and 'We'll see what you say then.'" McInnis could not see into the men's holding cell. McInnis then asked a jailer whether "James McLean" was in the adjacent cell and the jailer confirmed that he was. Defendant did not object to the admission of the foregoing testimony.

Upon thorough review, we hold that defendant's argument has no merit. The challenged testimony in the case *sub judice* was not offered to prove the truth of the matter asserted. Rather, it was offered to explain why McInnis was afraid to testify. Even assuming *arguendo* that McInnis' testimony amounted to inadmissible hearsay, the admission of

STATE v. McLEAN

[251 N.C. App. 850 (2017)]

this testimony did not amount to plain error in light of the substantial evidence of defendant's guilt.

E. Fee for the State's Witness

[5] In his last argument on appeal, defendant contends that the trial court erred by assessing a fee against him to pay for the State's expert witness, Doctor Scott Martinelli ("Dr. Martinelli"). We agree.

At trial, the State called on Dr. Martinelli, an emergency-room physician who worked at Scotland Memorial Hospital. Dr. Martinelli was accepted as an expert in the field of emergency medicine and testified regarding the treatment he administered to Braddy on 26 April 2014. During sentencing, the trial court ordered that defendant, as a condition of any early release or post-release supervision, must reimburse the State \$5,075.00 for the services of his court-appointed attorney, \$60.00 appointment fee, and \$780.00 for the testimony of Dr. Martinelli.

The trial court also signed a form "CR-231" from the Administrative Office of the Courts on 15 October 2015. The form was entitled "Order for Expert Witness Fee in Criminal Cases at the Trial Level" and provided as follows:

The Court finds that:

The person named below[, Dr. Martinelli,] was compelled to attend court and testify as an expert, or provided necessary expert services pursuant to a prior court order, and the person named below was duly sworn and gave testimony of such nature and character as to qualify as an expert witness, or provided services that were necessary expenses of prosecution; and

Therefore, it is ORDERED that the amount listed as Total Compensation and Reimbursables To Be Paid be allowed this expert, *to be paid from Judicial Branch funds by the North Carolina Administrative Office of the Courts*. It is further ORDERED that all reasonable and necessary expenses already incurred, in accordance with G.S. 7A-343(9f), by the North Carolina Administrative Office of the Courts associated with this witness' appearance to be paid from the Judicial Branch funds by the North Carolina Administrative Office of the Courts.

(emphasis added). The total compensation and reimbursables to be paid was listed as \$780.00.

STATE v. McLEAN

[251 N.C. App. 850 (2017)]

The order listed several statutes regarding the authority of the trial court to order compensation for an expert: N.C. Gen. Stat. §§ 7A-300, 7A-314, 7A-343, 7A-454, and 8C-1, Rule 702. N.C. Gen. Stat. § 7A-300 lists the various expenses necessary for the proper functioning of the Judicial Department, including “[f]ees and travel expenses . . . of witnesses required to be paid by the State[.]” and provides that the operating expenses of the Judicial Department “shall be paid from State funds, out of appropriations for this purpose made by the General Assembly, or from funds provided by local governments pursuant to G.S. 7A-300.1, 153A-212.1, or 160A-289.1.” N.C. Gen. Stat. § 7A-300(a)(6) (2015). N.C. Gen. Stat. § 7A-314 sets out how witness fees and compensation are to be determined. N.C. Gen. Stat. § 7A-343 lists the duties of the Director of the Administrative Officer of the Courts, including “[p]rescrib[ing] policies and procedures for payment of those experts acting on behalf of the court or prosecutorial offices, as provided for in G.S. 7A-314(d).” N.C. Gen. Stat. § 7A-343(9f) (2015). N.C. Gen. Stat. § 7A-454 provides that “[f]ees for the services of an expert witness . . . for an indigent person and other necessary expenses of counsel shall be paid by the State in accordance with rules adopted by the Office of Indigent Defense Services.” N.C. Gen. Stat. § 7A-454 (2015). Lastly, N.C. Gen. Stat. § 8C-1, Rule 702 states that “[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion[.]” N.C. Gen. Stat. § 8C-1, Rule 702(a) (2015).

From the record, there does not appear to be any statutory authority for the trial court to require defendant, as a condition of any early release or post-release supervision, to pay the expenses of the State’s expert witness, Dr. Martinelli. The 15 October 2015 order of the trial court explicitly states that Dr. Martinelli is “to be paid from Judicial Branch funds by the North Carolina Administrative Office of the Courts.” As such, we vacate the trial court’s assessment of an expert witness fee as a condition of any early release or post-release supervision.

III. Conclusion

Defendant’s judgment entered upon his conviction for discharging a firearm within a building with intent to incite fear is vacated. The trial court did not err by denying defendant’s motion to dismiss the robbery with a dangerous weapon charge. The trial court did not commit plain error by allowing Lieutenant Butler to testify that Braddy “seemed truthful” or by allowing McInnis to testify that a jailer informed her that defendant was in an adjacent holding cell. We vacate the trial court’s

STATE v. PARISI

[251 N.C. App. 861 (2017)]

assessment of an expert witness fee as a condition of any early release or post-release supervision.

NO ERROR IN PART; VACATED IN PART.

Judges ELMORE and STROUD concur.

STATE OF NORTH CAROLINA
v.
JEFFREY ROBERT PARISI

No. COA16-635

Filed 7 February 2017

1. Motor Vehicles—impaired driving—motion to suppress—district court—appeal to appellate division—governing statute

An appeal in a driving while impaired case was governed by N.C.G.S. § 20-38.7 and N.C.G.S. § 15A-1432 where the superior court did not grant defendant's motion to suppress but only affirmed the district court's preliminary determination and again later affirmed the district's court's final order.

2. Motor Vehicles—impaired driving—motion to suppress—district court—appellate division jurisdiction

The Court of Appeals lacked jurisdiction to hear the State's appeal on defendant's motion to suppress in a DWI prosecution. The State does not possess a statutory right to appeal to the appellate division from a district court's final order granting defendant's pretrial motion to suppress evidence. While the district court order in this case was labeled "Preliminary Order of Dismissal," this heading was mere surplusage, as the district's court's written order granted only the motion to suppress, and neither the record nor the written order indicated that defendant also made a pretrial motion to dismiss under N.C.G.S. § 20-38.6(a) or that the district court addressed a dismissal motion.

Appeal by the State from order entered 6 April 2016 by Judge Michael D. Duncan in Wilkes County Superior Court. Heard in the Court of Appeals 9 January 2017.

STATE v. PARISI

[251 N.C. App. 861 (2017)]

Attorney General Joshua H. Stein, by Assistant Attorney General John W. Congleton, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Michele A. Goldman, for defendant-appellee.

TYSON, Judge.

The State appeals from the superior court's order affirming the district court's final order, which granted Jeffrey Robert Parisi's ("Defendant") motion to suppress and dismissed the charge of driving while impaired ("DWT"). We dismiss in part, vacate in part, and remand.

I. Factual Background

On 1 April 2014, at approximately 11:30 p.m., Wilkesboro Police Officer Anderson was operating a checkpoint and observed Defendant as he drove up to the checkpoint. While Officer Anderson observed nothing illegal about Defendant's driving, he overheard a "disturbance" between the occupants inside the vehicle. When the vehicle approached where Officer Anderson was standing, the occupants became silent.

Officer Anderson approached the driver's door and shined his light into the vehicle to look at the occupants. At that point, Officer Anderson observed an opened carton, or "box," used to carry alcohol located on the passenger side floorboard. He did not observe any opened individual bottles or cans of alcohol. He also noticed an odor of alcohol coming from the vehicle.

Officer Anderson spoke with Defendant and observed Defendant had glassy and watery eyes. Officer Anderson asked Defendant to pull off to the side of the road and requested Defendant to exit the vehicle. At this point, Officer Anderson realized the moderate smell of alcohol was coming from Defendant and not from inside the vehicle. Defendant admitted he had consumed three beers earlier in the evening.

Officer Anderson testified Defendant "did not appear grossly impaired," but had Defendant perform three field sobriety tests: the walk-and-turn test, the one-leg-stand test, and the Horizontal Gaze Nystagmus ("HGN") test. Before each test, Officer Anderson gave Defendant instructions on how to perform the test, which Defendant was able to follow.

On the walk-and-turn test, Defendant had a gap, greater than a half an inch, between his heel and toe on two steps. Officer Anderson

STATE v. PARISI

[251 N.C. App. 861 (2017)]

testified this counted as one clue out of eight possible clues of impairment. On the one-leg-stand test, Defendant swayed and used his arms for balance, which Officer Anderson counted as two out of four possible clues of impairment. Officer Anderson also administered the HGN test and, over Defendant's objection, was allowed to testify as an expert on the test. Officer Anderson testified all six clues of impairment were present on the test.

Based upon these tests, Officer Anderson formed an opinion that Defendant had consumed a sufficient quantity of alcohol to impair his mental and physical faculties. Defendant was charged with driving while impaired. The next day, a magistrate's order was entered finding probable cause to detain.

On 17 June 2015, Defendant appeared in Wilkes County District Court and made a pre-trial, oral motion to "suppress pc & checkpoint." The district court denied the checkpoint motion, but granted the motion to suppress. The State gave oral notice of appeal.

Before the district court entered its written order, the State filed a written notice of appeal to the superior court on 27 July 2015 to ensure that its appellate rights were preserved. The sole basis for the State's appeal was "that there was probable cause to arrest Defendant for the charge of driving while impaired."

The district court entered a written order on 23 September 2015. While the written order was labeled "Preliminary Order of Dismissal," it only granted Defendant's motion to suppress and did not dismiss Defendant's charge. The State again filed a written notice of appeal to the superior court pursuant to N.C. Gen. Stat. § 20-38.7. The State argued "no competent evidence was presented to support the motion to suppress."

Aside from the district court's order being labeled as a "dismissal," nothing indicates the district court actually entered a preliminary dismissal or that the State had appealed from such a dismissal. Each of the State's notices of appeal specifically and solely addressed Defendant's motion to suppress. However, on appeal, the superior court granted "Defendant's Motion to Suppress *and Motion to Dismiss*" and remanded the case to the district court for entry of a final order "consistent with [its] Order." (emphasis supplied). On 11 March 2016, the district court entered its final order, which suppressed evidence supporting Defendant's arrest and dismissed the DWI charge.

The State appealed the district court's final order to the superior court, along with the proper certification. *See* N.C. Gen. Stat. § 15A-1432

STATE v. PARISI

[251 N.C. App. 861 (2017)]

(2015). On 6 April 2016, the superior court affirmed the district court's final order suppressing the evidence supporting the arrest of Defendant and dismissing the charge. The State appeals.

II. Issues

The State argues the district court erred by (1) concluding that Officer Anderson lacked probable cause to arrest Defendant for driving while impaired, and (2) granting Defendant's motion to suppress and dismissing the case. The State further argues the superior court erred by affirming the district court's final order and requests this Court to reverse the superior court's order.

Defendant argues this Court lacks jurisdiction to hear this case. He asserts he did not make a pre-trial motion to dismiss and the district court never entered a preliminary order dismissing the case. As a result, the superior court on its review of the district court's preliminary order lacked subject matter jurisdiction to remand the case for dismissal. If so, the superior court possessed jurisdiction to solely consider the district court's preliminary order granting Defendant's motion to suppress. Defendant argues the superior court and district court orders dismissing the case are nullities and the State has no statutory right to appeal the district court's final order suppressing the evidence.

Defendant further argues, even if this Court has jurisdiction to hear the State's appeal, the district court did not err in granting Defendant's motion to suppress. Defendant argues the district court's findings of fact support its conclusion of law that he was arrested without probable cause.

III. Standard of Review

The issue of subject matter jurisdiction may be raised at any time, including for the first time on appeal. *Huntley v. Howard Lisk Co., Inc.*, 154 N.C. App. 698, 700, 573 S.E.2d 233, 235 (2002). Our standard of review for questions of subject matter jurisdiction is *de novo*. *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

IV. Jurisdiction

The procedure and appeals process for implied-consent offenses has been the subject of several recent cases before our courts. *See e.g.*, *State v. Miller*, __ N.C. App. __, 786 S.E.2d 367 (2016); *State v. Bryan*, 230 N.C. App. 324, 749 S.E.2d 900 (2013), *disc. review denied*, 367 N.C. 330, 775 S.E.2d 615 (2014); *State v. Osterhoudt*, 222 N.C. App. 620, 731 S.E.2d 454 (2012); *State v. Palmer*, 197 N.C. App. 201, 676 S.E.2d 559 (2009); *State v. Fowler*, 197 N.C. App. 1, 676 S.E.2d 523 (2009).

STATE v. PARISI

[251 N.C. App. 861 (2017)]

A. Grounds for the State's Appeal

[1] The State bases its appeal in this case upon N.C. Gen. Stat. §§ 20-38.7, 15A-979(c), 15A-1432, and 15A-1445. Neither N.C. Gen. Stat. §§ 15A-979 nor 15A-1445 are applicable to this appeal.

Our case law clearly provides that N.C. Gen. Stat. § 15A-1432 controls an appeal from a judgment of the superior court affirming the district court's final order, not N.C. Gen. Stat. § 15A-1445(a)(1). *Bryan*, 230 N.C. App. at 327, 749 S.E.2d at 902. N.C. Gen. Stat. §§ 15A-1445(b) and 15A-979 are also inapplicable. *See Osterhoudt*, 222 N.C. App. at 625, 731 S.E.2d at 458. These statutes allow the State to appeal to this Court when a superior court grants a defendant's motion to suppress. N.C. Gen. Stat. §§ 15A-1445(b) and 15A-979 (2015).

This Court has clarified "the State receives an automatic appeal as of right *only* from decisions by a superior court acting in its normal capacity." *Bryan*, 230 N.C. App. at 327-28, 749 S.E.2d at 903 (emphasis added) (citing *Osterhoudt*, 222 N.C. App. at 625, 731 S.E.2d at 458). In this case, the superior court did not grant Defendant's motion to suppress, but only affirmed the district court's preliminary determination on the motion to suppress, and again later affirmed the district court's final order. The provisions of N.C. Gen. Stat. §§ 20-38.7 and 15A-1432 govern this appeal.

B. Jurisdiction to Dismiss

[2] Defendant argues this Court lacks jurisdiction to hear the State's appeal on Defendant's motion to suppress. We agree.

"[T]he State cannot appeal proceedings from a judgment in favor of the defendant in a criminal case in the absence of a statute clearly conferring that right." *State v. Dobson*, 51 N.C. App. 445, 446, 276 S.E.2d 480, 481 (1981). N.C. Gen. Stat. § 20-38.6 (2015) details the procedure for pre-trial motions in implied-consent offense cases:

The defendant may move to suppress evidence or dismiss charges only prior to trial, except the defendant may move to dismiss the charges for insufficient evidence at the close of the State's evidence and at the close of all of the evidence without prior notice. If, during the course of the trial, the defendant discovers facts not previously known, a motion to suppress or dismiss may be made during the trial.

N.C. Gen. Stat. § 20-38.6(a).

STATE v. PARISI

[251 N.C. App. 861 (2017)]

When a defendant makes a pre-trial motion to suppress or motion to dismiss, the district court may only enter a “preliminary determination” indicating whether the motion should be granted or denied. N.C. Gen. Stat. § 20-38.6(f). The district court cannot enter a final judgment on the pre-trial motion until after the State has appealed to the superior court, has indicated it does not intend to appeal, or fails to appeal within the time allowed. *Id.*

N.C. Gen. Stat. § 20-38.7 (2015) provides the process by which the State may appeal the district court’s preliminary determination on a defendant’s pre-trial motion:

The State may appeal to superior court any district court preliminary determination granting a motion to suppress or dismiss. If there is a dispute about the findings of fact, the superior court shall not be bound by the findings of the district court but shall determine the matter de novo. Any further appeal shall be governed by Article 90 of Chapter 15A of the General Statutes.

N.C. Gen. Stat. § 20-38.7(a).

After the superior court considers the State’s appeal from the district court’s preliminary determination pursuant to N.C. Gen. Stat. § 20-38.7(a), the court must “enter an order remanding the matter to the district court with instructions to finally grant or deny the defendant’s pretrial motion.” *Fowler*, 197 N.C. App. at 11, 676 S.E.2d at 535. The State does not have a statutory right to appeal and cannot appeal to the appellate division from a superior court’s interlocutory order remanding the case to the district court for entry of a final order. *Id.* at 7, 676 S.E.2d at 532.

On remand, the district court may properly enter a final order on the defendant’s pre-trial motion. *See id.* North Carolina’s statutes and case law differentiate the process by which the State can appeal the final order, depending upon whether the district court’s final order pertains to a pre-trial motion to suppress or a motion to dismiss. *See id.*; N.C. Gen. Stat. § 15A-1432. The State does not possess a statutory right to appeal to the appellate division from a district court’s final order granting a defendant’s pretrial *motion to suppress* evidence. *Fowler*, 197 N.C. App. at 29, 676 S.E.2d at 546.

On the other hand, this Court has held “the State has a right of appeal to the superior court from a district court’s final *dismissal* of criminal charges against a defendant pursuant to N.C.G.S. § 15A-1432(a)(1).”

STATE v. PARISI

[251 N.C. App. 861 (2017)]

Id. at 30, 676 S.E.2d at 546 (emphasis supplied). The State also has a right to appeal to the appellate division from a superior court's order affirming a district court's pre-trial *dismissal* pursuant to N.C. Gen. Stat. § 15A-1432(e). *Id.*

Here, the district court entered a preliminary determination granting Defendant's *motion to suppress*. While the written order was labeled "Preliminary Order of Dismissal," this heading is surplusage, as the district court's written order solely granted Defendant's pre-trial motion to suppress the evidence supporting the arrest of Defendant. Neither the record nor the written order indicated Defendant also made a pre-trial motion to dismiss under N.C. Gen. Stat. § 20-38.6(a), or that the district court addressed a dismissal motion. The State appealed the district court's "preliminary determination . . . granting defendant's *pre-trial motion to suppress the arrest* of Defendant." Nothing in the State's appeal to the superior court indicated it was appealing from the district court's preliminary determination granting a pre-trial motion to dismiss or that the district court intended to *dismiss* Defendant's charge pre-trial. (emphasis supplied).

Despite this fact, the superior court granted "Defendant's Motion to Suppress and Motion to Dismiss" and "remanded to the District Court for a final Order consistent with this Court's order." The superior court possessed jurisdiction to remand the motion to suppress to the district court with instructions to grant that motion.

However, the superior court did not possess jurisdiction to remand and order the district court to dismiss Defendant's charges. No motion to dismiss or preliminary determination granting a motion to dismiss had been made by the District Court, and the State did not indicate that it was appealing from such a motion.

The district court followed the superior court's instructions on remand, entered its final order granting Defendant's motion to suppress, and also dismissed the case. Pursuant to N.C. Gen. Stat. § 15A-1432(a), the State again appealed to the superior court, which affirmed the district court's order granting the motion to suppress and its dismissal of the case.

The State purported to appeal the superior court's second order to this Court pursuant to N.C. Gen. Stat. § 15A-1432(e). The superior court's first order remanding the case to the district court with instructions to dismiss was entered without jurisdiction. The subsequent orders dismissing the charges and affirming that dismissal were also without jurisdiction and erroneous.

STATE v. PARISI

[251 N.C. App. 861 (2017)]

The State relies upon a recent case of this Court to argue the district court's authority is not solely dependent upon a pre-trial motion from the parties and that the district court possesses the authority to dismiss an action *sua sponte* following the grant and affirmation of a motion to suppress. *State v. Loftis*, __ N.C. App. __, 792 S.E.2d 886 (2016). As such, the State contends the district court had authority to dismiss the case *ex mero motu* after the superior court remanded with instructions to grant the motion to suppress. On the facts before us, this contention is without merit.

Our courts' controlling precedents hold that a district court has no authority to dismiss a case pre-trial. *See State v. Joe*, 365 N.C. 538, 539, 723 S.E.2d 339, 340 (2012) (holding the trial court did not have authority to dismiss the case on its own motion); *State v. Overrocker*, 236 N.C. App. 423, 436, 762 S.E.2d 921, 929-30 (2014) (holding the trial court erred in dismissing DWI charge after allowing motion to suppress).

This Court's decision in *Loftis* is distinguishable from these cases. In *Loftis*, the trial court dismissed the pending action due to the State's failure to prosecute. *Loftis*, __ N.C. App. at __, 792 S.E.2d at 888. This Court upheld that dismissal on the basis of the trial court's "inherent power to manage its own docket." *Id.* at __, 792 S.E.2d at 890.

Here, the State did not fail to prosecute, which would have allowed the district court to dismiss the case *sua sponte*. *See id.* The trial courts' orders dismissing the case pre-trial were entered without jurisdiction. This argument is overruled.

V. Conclusion

The superior court erred in its review of the district court's preliminary determination to suppress, when it remanded the case to the district court with instructions to dismiss the case.

As such, all subsequent orders dismissing the case were also entered erroneously. We vacate those portions of the trial courts' orders dismissing the case.

The superior court possessed jurisdiction to review the district court's pre-trial preliminary determination on Defendant's motion to suppress. However, the State has no right to appeal the district court's final order granting Defendant's motion to suppress. *See Fowler*, 197 N.C. App. at 28-29, 676 S.E.2d at 545. We do not address the merits of the State's appeal regarding allowance of the motion to suppress and dismiss that portion of the State's appeal to this Court. The district court's final order to suppress remains undisturbed.

STATE v. ROGERS

[251 N.C. App. 869 (2017)]

As noted in *Fowler*, “[a] trial court’s decision to grant a pretrial motion to *suppress* evidence ‘does not mandate a pretrial dismissal of the underlying indictments’ because ‘[t]he district attorney may elect to dismiss or proceed to trial without the suppressed evidence and attempt to establish a *prima facie* case.’ ” *Fowler*, 197 N.C. App. at 28-29, 676 S.E.2d at 545 (emphasis original) (quoting *State v. Edwards*, 185 N.C. App. 701, 706, 649 S.E.2d 646, 650, *disc. review denied*, 362 N.C. 89, 656 S.E.2d 281 (2007)). As such, we vacate the trial courts’ orders of dismissal and remand to superior court for further remand to the district court for trial or further proceedings. *It is so ordered.*

DISMISSED IN PART; VACATED IN PART; AND REMANDED.

Chief Judge McGEE and Judge STROUD concur.

STATE OF NORTH CAROLINA

v.

ANTWARN LEE ROGERS

No. COA16-48

Filed 7 February 2017

1. Drugs—maintaining a vehicle for drugs—sufficiency of evidence—continuous maintenance or possession of the vehicle

The trial court should have dismissed a charge of maintaining a vehicle for keeping or selling a controlled substance where the evidence failed to demonstrate continuous maintenance or possession of the vehicle by defendant beyond the period of time he was surveilled on the afternoon of his arrest, or to show that defendant had used the vehicle on a prior occasion to keep or sell drugs.

2. Evidence—detectives’ opinion—defendant as drug dealer

There was no plain error in a prosecution for maintaining a vehicle for keeping or selling a controlled substance and related offenses where defendant contended that detectives offered improper opinions to the effect that defendant was a drug dealer. The detectives expressed their own experience and observations in ordinary testimony.

STATE v. ROGERS

[251 N.C. App. 869 (2017)]

3. Evidence—hearsay—police informant—background of investigation

There was no plain error in a prosecution for maintaining a vehicle for keeping or selling a controlled substance and related offenses where defendant alleged that the trial court admitted hearsay evidence by allowing a detective to testify about information collected from non-testifying witnesses. It was clear that the testimony at issue was not introduced to prove defendant's guilt but to establish the background and reasons for the detective's investigation.

4. Evidence—prior investigations and warrants—context of investigation—police conduct

There was no plain error in a prosecution for maintaining a vehicle for keeping or selling a controlled substance and related offenses in the admission of testimony that defendant had been the subject of prior investigations and had outstanding warrants. The testimony was not admitted to demonstrate that defendant was guilty of any offenses but to explain the context of the police investigation and the detectives' conduct.

Judge STROUD concurring in part and dissenting in part.

Appeal by defendant from judgment entered 13 August 2015 by Judge W. Allen Cobb, Jr., in New Hanover County Superior Court. Heard in the Court of Appeals 8 August 2016.

Attorney General Roy Cooper¹, by Special Deputy Attorney General Heather H. Freeman, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Constance E. Widenhouse, for defendant-appellant.

CALABRIA, Judge.

Antwarn Lee Rogers (“defendant”) appeals from jury verdicts finding him guilty of possession with intent to manufacture, sell and deliver cocaine; intentionally keeping and/or maintaining a vehicle used for the keeping and/or selling of controlled substances; possession of drug paraphernalia; possession of one-half ounce or less of marijuana; and having attained the status of habitual felon. Because the evidence did

1. When the briefs and records in this case were filed, Roy Cooper was Attorney General. Joshua H. Stein was sworn in as Attorney General on 1 January 2017.

STATE v. ROGERS

[251 N.C. App. 869 (2017)]

not establish continuous possession of a vehicle for the purpose of keeping or selling a controlled substance, the trial court erred in denying defendant's motion to dismiss the charge of maintaining a vehicle for the keeping and/or selling of a controlled substance. However, with respect to defendant's other arguments, the trial court did not commit plain error.

I. Factual and Procedural Background

Between December of 2012 and August of 2013, Detective Evan Luther of the Vice and Narcotics Unit of the New Hanover Sheriff's Department ("Detective Luther") "bec[a]me familiar with the name of Antwarrn Rogers[]" through his narcotics investigations. On 8 August 2013, Detective Luther was investigating defendant, and determined that he was driving a particular vehicle and staying in a particular hotel room. He assembled a search warrant and notified assisting detectives to monitor the hotel room. Detective Luther also advised the assisting detectives that defendant "was wanted on outstanding warrants[.]" so that they knew that they could initiate contact with defendant to serve outstanding processes, irrespective of whether the search warrant was granted. After the detectives detained defendant, Detective Luther executed the search warrant, which authorized him to search both the hotel room and the vehicle in connection with defendant.

In the hotel room, detectives located "a baggy that was in the toilet dispenser roll" containing narcotics. Detectives located "another baggy with white rock substance[]" and "a black digital scale[.]" Detective Luther swabbed the scale with a field test kit, which revealed the presence of cocaine.

In the vehicle, detectives located "two baggies with a white rock substance . . . inside of the gas cap" of the vehicle. They also found money folded and placed inside of a Timberland boot in the car. A detective also located a rolled marijuana cigarette inside the ashtray in the front of the vehicle.

Defendant was indicted for possession with intent to manufacture, sell, and deliver cocaine; manufacture of cocaine; felony possession of cocaine; maintaining a vehicle for the sale of a controlled substance; possession of drug paraphernalia; possession of one-half ounce or less of marijuana; and having attained the status of an habitual felon.

At the outset of trial, the State declined to proceed on the charge of manufacture of cocaine. At the close of the State's evidence, defendant moved to dismiss the charges. The trial court granted defendant's motion to dismiss with respect to the charge of felony possession of

STATE v. ROGERS

[251 N.C. App. 869 (2017)]

cocaine, and denied the motion with respect to the remaining charges. Defendant offered no evidence.

The jury returned verdicts finding defendant guilty of possession with intent to manufacture, sell, and deliver cocaine; maintaining a vehicle for the sale of a controlled substance; possession of drug paraphernalia; and possession of one-half ounce or less of marijuana. The jury further found that defendant had attained the status of an habitual felon.

Defendant failed to attend the trial, and the trial court entered an order finding that he could be tried *in absentia*, and that entry of judgment would be continued until defendant could be brought before the court.

On 13 August 2015, the trial court entered judgment upon the jury's verdicts, and sentenced defendant to consecutive active sentences of 35-54 months for maintaining a vehicle, possession of drug paraphernalia, and possession of marijuana, and 111-146 months for possession with intent to manufacture, sell, and deliver cocaine, in the North Carolina Department of Adult Correction.

Defendant appeals.

II. Motion to Dismiss

In his first argument, defendant contends that the trial court erred by denying his motion to dismiss the charge of maintaining a vehicle for the sale of a controlled substance. We agree.

A. Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

Upon review of a motion to dismiss, the court determines whether there is substantial evidence, viewed in the light most favorable to the State, of each essential element of the offense charged and of the defendant being the perpetrator of the offense.

State v. Lane, 163 N.C. App. 495, 499, 594 S.E.2d 107, 110 (2004) (citations omitted). "The [trial] court should grant a motion to dismiss if the State fails to present substantial evidence of every element of the crime charged." *State v. McDowell*, 329 N.C. 363, 389, 407 S.E.2d 200, 214 (1991). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

STATE v. ROGERS

[251 N.C. App. 869 (2017)]

B. Analysis

[1] N.C. Gen. Stat. § 90-108(a)(7) (2015) makes it unlawful to “knowingly keep or maintain any . . . vehicle . . . which is used for the keeping or selling of [controlled substances].” “This statute prohibits the maintaining of a vehicle only when it is used for ‘keeping or selling’ controlled substances[.]” *State v. Mitchell*, 336 N.C. 22, 32, 442 S.E.2d 24, 29 (1994). “The focus of the inquiry is on the *use*, not the contents, of the vehicle.” *Mitchell*, 336 N.C. at 34, 442 S.E.2d at 30 (emphasis in original).

Thus, the fact that an individual within a vehicle possesses marijuana on one occasion cannot establish the vehicle is used for keeping marijuana; nor can one marijuana cigarette found within the car establish that element. Likewise, the fact that a defendant was in his vehicle on one occasion when he sold a controlled substance does not by itself demonstrate the vehicle was kept or maintained to sell a controlled substance.

State v. Dickerson, 152 N.C. App. 714, 716, 568 S.E.2d 281, 282 (2002) (citation, quotation marks, brackets, and ellipses omitted). N.C. Gen. Stat. § 90-108(a)(7) does not require the State to demonstrate a defendant’s ownership of a vehicle, or that a sale was actually transacted from the vehicle. “The totality of the circumstances controls, and whether there is sufficient evidence of the ‘keeping or maintaining’ element depends on several factors, none of which is dispositive.” *State v. Hudson*, 206 N.C. App. 482, 492, 696 S.E.2d 577, 584. In *Mitchell*, in interpreting N.C. Gen. Stat. § 90-108(a)(7), our Supreme Court observed that

[t]he word ‘keep’ is variously defined as follows: ‘[t]o have or retain in one’s power or possession; not to lose or part with; to preserve or retain. . . . To maintain continuously and methodically. . . . To maintain continuously and without stoppage or variation . . . [; t]o take care of and to preserve’

Id. at 32, 442 S.E.2d at 29 (quoting *Black’s Law Dictionary* 868 (6th ed. 1990)). Thus, “‘[k]eep’ . . . denotes not just possession, but possession that occurs *over a duration of time*.” *Id.* at 32, 442 S.E.2d at 30 (emphasis added).

In *Hudson*, a law enforcement officer had stopped a car carrier truck driven by the defendant after being alerted of the vehicle’s “possible drug activity” and observing the truck weaving over the center line and fog line twice. 206 N.C. App. at 483-84, 696 S.E.2d at 579. The officer

STATE v. ROGERS

[251 N.C. App. 869 (2017)]

asked to see the bills of lading for the cars being transported on the truck. *Id.* at 484, 696 S.E.2d at 579. One of the bills of lading for a particular car was different from those for the other cars and aroused the officer's suspicion due to the contact information, pick-up address, and drop-off address listed. *Id.* Ultimately, the defendant consented for officers to search the carrier truck as well as the vehicles it was carrying. In the course of their search, officers found 7.5 pounds of marijuana in the trunk of the car with the unusual bill of lading. *Id.* at 484, 696 S.E.2d at 579-80. The defendant was subsequently convicted of, *inter alia*, maintaining a vehicle for the keeping of a controlled substance in violation of N.C. Gen. Stat. § 90-108(a)(7).

On appeal, the defendant argued his motion to dismiss the charge of keeping or maintaining a vehicle used for the keeping or selling of a controlled substance should have been granted because there was no evidence that the possession of the marijuana in the trunk of the vehicle “‘occurred over a duration of time or that [he] used the vehicle on any prior occasion to keep or sell controlled substances.’” *Id.* at 492, 696 S.E.2d at 584. This Court disagreed, noting that the bill of lading showed that the defendant had picked up the car two days before he was arrested and that he had possessed the car since then while transporting it from Miami *en route* to New York. *Id.* We stressed that this evidence demonstrated “[the d]efendant had *maintained possession* as the authorized bailee of the vehicle *continuously and without variation for two days before being pulled over*[.]” *Id.* at 492, 696 S.E.2d at 584 (emphases added). The defendant “retained control and disposition over the vehicle” over the course of multiple days, which we deemed “indisputably . . . a duration of time.” *Id.* See also *Lane*, 163 N.C. App. at 500, 594 S.E.2d at 111 (providing that a conviction under N.C. Gen. Stat. § 90-108(a)(7) requires evidence of either “possession of [a controlled substance] in the vehicle that occurred over a duration of time, [or] . . . evidence that [a] defendant . . . used the vehicle on a prior occasion to sell [a controlled substance].”))

In the present case, Detective Luther testified that he had been investigating defendant since approximately December 2012. He also testified that he had “information that [defendant] had been in possession [of the white Cadillac] for some period of time[.]” However, it appears from the transcript that Detective Luther obtained that information earlier on the day of defendant's arrest, from two individuals pulled in an unrelated traffic stop. The State seems to confirm this in their brief to this Court, noting that

[a]s a result of that traffic stop, Detective Luther was provided with information that assisted in an ongoing

STATE v. ROGERS

[251 N.C. App. 869 (2017)]

investigation of Defendant, *including the description of a vehicle Defendant would be driving* and an address where he would be located. *Based on that information*, Detective Luther set up surveillance during the afternoon of 8 August 2013 and *notified other detectives to look out for Defendant in a white Cadillac* and at room 129 at the Econo Lodge on Market Street in Wilmington.

(Emphasis added.) We find no indication that law enforcement officers had information, prior to the day of defendant's arrest, linking defendant to the white Cadillac.

Detective Luther also testified that once he obtained certain identifying information about defendant on 8 August 2013, he "notified all the assisting detectives places to go, *a vehicle specifically to be looking for*, a room number at a hotel to be specifically focused on, and for any comings or goings from that hotel room." Specifically, "based upon the information that [Detective Luther had] received[,] he "relay[ed] to other officers to be looking for [a] white Cadillac with the license number that [he] gave."

Officers began surveilling the Econo Lodge between 3:00 and 3:30 p.m. Lieutenant Leslie Wyatt ("Lt. Wyatt") testified that he drove by the Econo Lodge, observed a white Cadillac parked at the adjacent Ramada Inn, and then drove to a nearby gas station to get gas. When Lt. Wyatt returned minutes later, the Cadillac was gone. Lt. Wyatt parked in the Ramada Inn parking lot to begin surveillance of Room 129 at the Econo Lodge, and "roughly [ten] minutes after . . . set[ting] up [the] surveillance, [he] saw the same white Cadillac that was parked at the Ramada pull in the parking lot of the Econo Lodge and park . . . almost directly in front of Room 129." Lt. Wyatt observed only one person, whom he recognized as defendant, in the vehicle at that time. Lt. Wyatt saw defendant enter Room 129. He testified that defendant was in the hotel room "[a] total of probably [forty-five] minutes" before "[h]e came out of the room, shut the door behind him, and got into the white Cadillac." Lt. Wyatt and several other officers followed as defendant drove to an apartment complex, left the complex, and continued driving. Shortly thereafter, officers "were able to conduct a vehicle stop on the Cadillac and place [defendant] under arrest for outstanding warrants."

While other officers set up surveillance at the Econo Lodge, Detective Luther began preparing a search warrant. During preparation of the search warrant, at approximately 3:30 p.m., Detective Luther learned that "the white Cadillac was confirmed to be at the Ramada, [consistent

STATE v. ROGERS

[251 N.C. App. 869 (2017)]

with] *the information that [he] had received* [during the unrelated traffic stop].” (Emphasis added.) The search warrant was signed at 4:20 p.m. Detective Luther drove to the Econo Lodge with the warrant, arriving at approximately 4:30 p.m. By the time Detective Luther arrived, defendant was already “detained in another detective’s vehicle[.]” After searching the hotel room and seizing evidence, officers searched “the 2000 Cadillac DeVille that [defendant] was stopped and detained in.”

The evidence thus showed that defendant was surveilled and observed to be the sole driver and occupant of the Cadillac for, at most, one-and-a-half hours on the afternoon of his arrest. *Cf. State v. Calvino*, 179 N.C. App. 219, 222-23, 632 S.E.2d 839, 842-43 (2006) (finding sufficient evidence of keeping a motor vehicle for the purpose of selling a controlled substance, where informant purchased drugs from defendant in the same vehicle on two separate occasions, one week apart, and “[b]oth of these transactions were observed and recorded by police.”); *State v. Bright*, 78 N.C. App. 239, 240, 337 S.E.2d 87, 87 (1985) (upholding defendant’s conviction under N.C. Gen. Stat. § 90-108(a)(7), and noting that defendant was stopped while driving a car arresting officer “had seen defendant operating . . . on several occasions.”). The evidence did not show that defendant had “maintained possession . . . of the [Cadillac] *continuously and without variation*” for anything beyond a couple of hours on that single day. *See Hudson*, 206 N.C. App. at 492, 696 S.E.2d at 584 (emphasis added).

The evidence showed only that, earlier on the day of defendant’s arrest, officers received information from two individuals pulled in an unrelated traffic stop indicating they should look for defendant in a specific vehicle and at a specific hotel room. The State failed to establish that no other individual accessed, occupied, operated, or otherwise used the Cadillac prior to the brief period officers surveilled defendant on the afternoon of his arrest. *See State v. Boswell*, ___ N.C. App. ___, 680 S.E.2d 901, 2009 WL 2139184 at *3 (2009) (unpublished) (finding insufficient evidence of keeping or maintaining a vehicle, where “the vehicle driven by defendant was owned by his father, and numerous people were allowed to use the vehicle on a regular basis.”). The Cadillac was registered in the name of another individual, whose criminal history included a prior drug charge. Detective Luther testified he “didn’t know whether or not [that individual] was at [the Econo Lodge] hotel room” on 8 August 2013 “before the [surveillance] started[.]” Detective Luther also testified several items were found in the Cadillac, including a hat, that he “couldn’t classify [as belonging to defendant].” He testified only that “[b]ased off of the information that was provided to [him], [he]

STATE v. ROGERS

[251 N.C. App. 869 (2017)]

had reason to believe [defendant] had been in that car for quite some time and was using that vehicle.”

Even if, as Detective Luther contended, there was reason to believe defendant had been “in possession of [the Cadillac] for some period of time,” there was insufficient evidence that defendant used that vehicle on any prior occasion *for the purpose of keeping or selling a controlled substance*, which N.C. Gen. Stat. § 90-108(a)(7) requires. *See, e.g., State v. Craven*, 205 N.C. App. 393, 403, 696 S.E.2d 750, 756 (2010), *rev’d in part on other grounds*, 367 N.C. 51, 744 S.E.2d 458 (2013) (finding sufficient evidence of keeping and maintaining a vehicle under N.C. Gen. Stat. § 90-180(a)(7), where witness testified she and defendant transported cocaine in the vehicle on two separate dates, and expert testified defendant was found to possess cocaine in the vehicle on a third date; evidence was “adequate to support a conclusion that defendant had possession of cocaine in his mother’s car *over a duration of time and/or on more than one occasion*” (emphasis added)); *cf. State v. Horton*, 189 N.C. App. 211, 657 S.E.2d 448, 2008 WL 565485 at *2 (2008) (unpublished) (finding insufficient evidence of keeping or maintaining a vehicle, where “the vehicle driven by [d]efendant was owned by another person and loaned to him on the day he was pulled over and searched. No evidence was presented that [d]efendant used this vehicle on any other occasion to keep a controlled substance”). On the afternoon of defendant’s arrest, surveilling officers did not report seeing defendant “[go] to [the Cadillac’s] gas cap [or] open[] and close[] the gas cap.” However, this was insufficient to support an inference that the drugs found in the Cadillac’s locked gas cap had been hidden in the car on a prior date, because nothing was known about the use or maintenance of the vehicle prior to 3:00 or 3:30 p.m. *that day*, much less in the preceding days or months.

The receipt found in the Cadillac was likewise insufficient to “support[] a logical and legitimate deduction” that defendant had used the Cadillac on a previous occasion to keep or sell drugs. *State v. Piggott*, 331 N.C. 199, 207, 415 S.E.2d 555, 559-60 (1992) (noting evidence is insufficient to withstand a motion to dismiss if it “merely raise[s] a suspicion or conjecture” as to the existence of a fact in issue). Detective Luther testified “[it was] not [his] contention that the receipt [found in the Cadillac] was in any way involved in any drug-related matter[.]” He further conceded he “[didn’t] know if [the receipt] was in [the Cadillac] the day before [8 August 2013].” The receipt did not amount to substantial evidence that defendant had used the Cadillac, *over a period of time*, to *keep or sell a controlled substance*.

STATE v. ROGERS

[251 N.C. App. 869 (2017)]

Because the State failed to demonstrate continuous maintenance or possession of the Cadillac by defendant beyond the period of time he was surveilled on the afternoon of his arrest, or show that defendant had used the Cadillac on a prior occasion to keep or sell drugs, it could not rely on evidence seized from the hotel room to support a charge under N.C. Gen. Stat. § 90-108(a)(7). The evidence showed defendant possessed drugs in the Cadillac on one occasion. There was insufficient evidence to show that, even on the day of his arrest, defendant's use and control of the Cadillac was exclusive. While there was evidence, obtained from two individuals who happened to be arrested earlier on the same day as defendant's arrest, that defendant "possessed" the Cadillac "for some period of time," there was insufficient evidence to show defendant had used the vehicle on any prior occasion for keeping or selling a controlled substance. Accordingly, the trial court should have dismissed the charge of maintaining a vehicle for the purpose of keeping or selling a controlled substance. We reverse the trial court's denial of defendant's motion to dismiss that charge, and remand for resentencing.

III. Plain Error

In his remaining arguments, defendant contends that the trial court committed various errors which were not properly preserved by objection. We therefore review them for plain error.

A. Standard of Review

"In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(a)(4); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008).

The North Carolina Supreme Court "has elected to review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996).

For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. *See Odom*, 307 N.C. at 660, 300 S.E.2d at 378. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error "had a probable impact on the jury's finding that

STATE v. ROGERS

[251 N.C. App. 869 (2017)]

the defendant was guilty.” *See id.* (citations and quotation marks omitted); *see also Walker*, 316 N.C. at 39, 340 S.E.2d at 83 (stating “that absent the error the jury probably would have reached a different verdict” and concluding that although the evidentiary error affected a fundamental right, viewed in light of the entire record, the error was not plain error).

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012).

B. Defendant’s Conduct

[2] Defendant first contends that the trial court committed plain error in admitting the opinions of detectives regarding defendant’s conduct. We disagree.

Defendant contends that Detective Luther and Lt. Wyatt offered improper opinions “to the effect that Mr. Rogers was a drug dealer”. Defendant contends that their testimony about the manner in which defendant conducted himself with regards to both the hotel room and the vehicle, and Detective Luther’s testimony that the baggies of cocaine found in defendant’s hotel room were “indicative of sale, not use” conveyed to the jury that defendant was a drug dealer. In essence, defendant contends that the testimony of Detective Luther and Lt. Wyatt invaded the province of the jury by constituting an opinion of defendant’s guilt.

In the instant case, Detective Luther testified that he has “investigated or been assisting” fifty drug cases involving hotels and motels. He testified that, in his experience in these investigations, there are “common characteristics” associated with such cases. He then testified, again based on his experience, that defendant’s conduct in how he rented the hotel room and kept it mostly bare was consistent with the patterns he had observed in prior drug cases. He further testified that, based on his experience, the plastic baggies found in the bathroom were of a sort commonly associated with the sale, not the personal use, of drugs.

Lt. Wyatt testified to his observations when defendant arrived at the hotel. Specifically, he testified that, shortly after entering the room, defendant opened the blinds on the window. He testified that, in his experience, “people that are involved in the narcotics trade like to keep an eye outside their houses for law enforcement, [or] potential buyers[.]” Lt. Wyatt also testified that, when defendant left the hotel, he drove to an apartment complex, drove onto another road, then turned around and went back in the direction from which he came. He testified that this was common to drug dealers, as it was “[i]ndicative of someone seeing if they’re being followed.”

STATE v. ROGERS

[251 N.C. App. 869 (2017)]

We hold that the testimony of Detective Luther and Lt. Wyatt was not improper opinion testimony concerning defendant's guilt, but rather ordinary testimony expressing their own experience and observations. On plain error review, the burden falls to defendant to demonstrate that, absent the admission of this testimony, the jury probably would have reached a different verdict. In light of the fact that this testimony was based upon the officers' own experience and knowledge, and in light of the physical evidence of drugs and paraphernalia found in the hotel room and vehicle, we hold that defendant has failed to meet the burden of showing plain error.

This argument is without merit.

C. Hearsay Evidence

[3] In his next argument, defendant contends that the trial court erred by admitting alleged hearsay testimony. Specifically, defendant contends that the trial court erred by allowing Detective Luther to testify about information collected from non-testifying witnesses during an investigation of defendant because it was hearsay. We disagree.

"Hearsay is defined as 'a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.'" *State v. Morgan*, 359 N.C. 131, 154, 604 S.E.2d 886, 900 (2004) (quoting N.C. Gen. Stat. § 8C-1, Rule 801(c) (2003)). "Hearsay is not admissible except as provided by statute or by these rules." N.C. Gen. Stat. § 8C-1, Rule 802 (2015). In *State v. Rollins*, regarding the testimony given by an agent about information he learned from a third-party, this Court held that "statements are not hearsay if they are made to explain the subsequent conduct of the person to whom the statement was directed." *State v. Rollins*, 226 N.C. App. 129, 138-39, 738 S.E.2d 440, 448 (2013) (citation and quotations omitted).

In the instant case, Detective Luther testified that he spoke about defendant during his investigation with several people involved with the distribution of drugs. Detective Luther stated that he received information about defendant's vehicle, location, telephone number, and other addresses at which defendant may be located from the people he interviewed.

We have previously held that hearsay testimony given by an informant to the witness concerning a defendant's conduct was admissible to "explain how the investigation of [d]efendants unfolded, why [d]efendants were under surveillance . . . and why [the witness] followed the [defendants'] vehicle[.]" *State v. Wiggins*, 185 N.C. App. 376, 383-84,

STATE v. ROGERS

[251 N.C. App. 869 (2017)]

648 S.E.2d 865, 871 (2007); *see also State v. Levy*, 181 N.C. App. 491, 500, 640 S.E.2d 394, 399 (2007) (holding that an informant's explanation was admissible to explain an officer's presence at a restaurant); *State v. Batchelor*, 202 N.C. App. 733, 737, 690 S.E.2d 53, 56 (2010) (holding that an informant's identification of the defendant was admissible to explain the officer's presence at a car wash, rather than to prove the defendant's guilt).

In the instant case, it is clear that the testimony at issue was not introduced to prove defendant's guilt, but to establish the background and reasons for Detective Luther's investigation. We hold that defendant has failed to show that, absent this evidence, the jury probably would have reached a different verdict.

This argument is without merit.

D. Drug Investigations and Arrest Warrants

[4] Defendant lastly contends that the trial court committed plain error by admitting testimony that defendant was the subject of prior investigations and had outstanding warrants. We disagree.

Defendant contends that the evidence was hearsay and irrelevant and should not have been admitted. However, much like the evidence of Detective Luther's sources, this evidence was not admitted for the truth of the matter asserted, but to explain detectives' conduct. Specifically, this evidence was introduced at trial to explain Detective Luther's instruction to his assisting detectives to detain defendant pending the execution of the search warrant. The assisting detectives were able to do so due to the outstanding warrants on which defendant was wanted.

This evidence was not introduced to demonstrate that defendant was guilty of the instant offenses or any others, but rather to explain the context of the police investigation. As such, we hold that defendant has not shown that, absent this evidence, the jury probably would have reached a different verdict.

This argument is without merit.

IV. Conclusion

Because the evidence, taken in the light most favorable to the State, did not support the elements of the charge of maintaining a vehicle for keeping or selling a controlled substance, the trial court erred in denying defendant's motion to dismiss. That denial is therefore reversed, and this matter is remanded for resentencing. Because defendant has failed to show that, absent the additional errors he alleges, the jury would

STATE v. ROGERS

[251 N.C. App. 869 (2017)]

probably have reached a different verdict, we hold that he has failed to demonstrate plain error.

NO ERROR IN PART; REVERSED AND REMANDED IN PART.

Chief Judge McGEE concurs.

Judge STROUD concurs in part and dissents in part by separate opinion.

STROUD, Judge, concurring in part and dissenting in part.

I concur with the majority opinion on all issues except the first, regarding sufficiency of the evidence to support defendant's conviction of maintaining a vehicle for the "keeping or selling of [controlled substances]." N.C. Gen. Stat. § 90-108(a)(7) (2015). On this issue, I dissent because I believe the evidence is sufficient when viewed "in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

Under N.C. Gen. Stat. § 90-108(a)(7), it is unlawful to "knowingly keep or maintain any . . . vehicle . . . which is used for the keeping or selling of [controlled substances]." The majority correctly notes that the word "keep" in the statute "denotes not just possession, but possession that occurs over a duration of time." *State v. Mitchell*, 336 N.C. 22, 32, 442 S.E.2d 24, 30 (1994). However, as the majority also notes, "[t]he totality of the circumstances controls, and whether there is sufficient evidence of the 'keeping or maintaining' element depends on several factors, none of which is dispositive." *State v. Hudson*, 206 N.C. App. 482, 492, 696 S.E.2d 577, 584 (2010). Our disagreement is how long the "duration of time" of the "keeping" must be. *Mitchell*, 336 N.C. at 32, 442 S.E.2d at 30.

After evaluating the totality of the circumstances in the present case, I believe the State presented substantial evidence that defendant "knowingly [kept] or maintain[ed]" the vehicle within the meaning of N.C. Gen. Stat. § 90-108(a)(7). The majority implies that because there is "no indication law enforcement officers had information, prior to the day of Defendant's arrest, linking Defendant to the white Cadillac[.]" a reasonable jury could not have found "possession that occurs over a duration of time" to support the keeping element. *Mitchell*, 336 N.C. at 32, 442 S.E.2d at 30.

STATE v. ROGERS

[251 N.C. App. 869 (2017)]

First, our case law does not establish what specific “duration of time” is sufficient. The majority references *Hudson*, where two days of possession and use of the vehicle in question was deemed “indisputably . . . a duration of time.” 206 N.C. App. at 492, 696 S.E.2d at 584. But would *Hudson* have been decided differently if defendant had been pulled over two hours after picking up the car, rather than two days? *Hudson* is an easier case and “indisputably” occurred over “a duration of time.” *Id.* But the analysis does not change just because the situation in this case is less clear cut.

We review the evidence in the light most favorable to the State, drawing reasonable inferences therefrom. *See, e.g., State v. Santiago*, 148 N.C. App. 62, 68, 557 S.E.2d 601, 606 (2001) (“In reviewing the denial of a motion to dismiss for insufficient evidence, the trial court must consider the evidence in the light most favorable to the State and give the State every reasonable inference to be drawn therefrom.” (quotation marks and ellipses omitted)). Specifically, our job on appeal of a motion to dismiss is simply to evaluate whether the jury heard “substantial evidence, viewed in the light most favorable to the State, of each essential element of the offense charged and of the defendant being the perpetrator of the offense.” *State v. Lane*, 163 N.C. App. 495, 499, 594 S.E.2d 107, 110 (2004) (citations omitted).

The majority views the evidence in this case as showing that defendant was “the sole driver and occupant of the Cadillac for, at most, one-and-a-half hours on the afternoon of his arrest.” In doing so, the majority interprets testimony from Detective Luther that defendant had been in possession of the vehicle “for some period of time” as only referring to information received the day he was arrested. But the jury also heard evidence that a narcotics investigation had been ongoing regarding defendant since December 2012, and that upon searching the Cadillac on the day defendant was arrested, officers found a receipt in the front seat dated 29 May 2013, for a \$30.00 “service fee” made out to defendant.

In addition, during the surveillance of the vehicle by law enforcement, defendant was the only driver of the vehicle; no one else rode in it. And in the Cadillac, in which only defendant had been seen, police found a marijuana cigarette in the ashtray, money folded inside of a boot on the back seat, and plastic baggies “with a white rock substance packaged in the baggies” hidden inside the gas cap. The gas cap was locked and had to be opened with a latch on the inside of the car, and the baggies were of the same color, type, and size – purple plastic bags – as those found in defendant’s hotel room.

STATE v. ROGERS

[251 N.C. App. 869 (2017)]

This evidence shows that defendant had been keeping the car for a period of time and that drugs had been hidden in the car at some time prior to when the officers stopped him, since he could not have put drugs into the gas cap while he was driving. Officers had been watching defendant's comings and goings in the car most of the day, and he had not placed anything in the gas cap while they were watching him, so the jury could infer that the baggies had to have been placed there sometime before their surveillance began. Based on all of these facts, I believe that while it is a closer call, this case is similar to *Hudson*, 206 N.C. App. at 492-93, 696 S.E.2d at 584, and that the evidence supports all of the essential elements of the crime charged, including "keeping" the vehicle over a period of time for the purpose of keeping drugs (cocaine in this case). The totality of the evidence in this case shows that defendant was "keeping" the Cadillac – as its the sole driver and occupant over a period of time – and that he was "keeping" cocaine in this vehicle, hidden inside the gas cap door, as required by N.C. Gen. Stat. § 90-108(a)(7).

Evidence was admitted at trial without objection indicating that defendant was in possession of the Cadillac "for some period of time[,]" which the jury could properly consider when making its determination. Furthermore, even accepting the majority's assumption of just one and a half hours of "keeping" the cocaine hidden in the gas cap of the vehicle, I find no case law or indication in N.C. Gen. Stat. § 90-108(a)(7) that this is an insufficient amount of time – under the totality of the circumstances in this case -- to demonstrate defendant was "keeping" the vehicle for the purpose of "keeping" drugs.

Although I am usually opposed to citing unpublished opinions, in this dissent I believe it is useful to note a recent unpublished opinion of this Court, *State v. Rousseau*, __ N.C. App. __, 793 S.E.2d 292, 2016 WL 7100567, 2016 N.C. App. LEXIS 1191 (COA 16-380) (Dec. 6, 2016) (unpublished). While not binding on this Court, *Rousseau* addresses this same issue, and based primarily upon the facts in that case, where the marijuana was found hidden in the engine compartment of the vehicle, this Court found there was sufficient evidence to support the conviction of "keeping" a controlled substance in the vehicle. *Id.*, 2016 WL 7100567, at *3, 2016 N.C. App. LEXIS 1191, at *8. This Court concluded in *Rousseau* that "the State presented substantial and uncontroverted evidence that the vehicle was used to 'keep' the marijuana" where drugs were found "inside the vehicle's engine compartment outside of the passenger area." *Id.* Although there was evidence in *Rousseau* that defendant "regularly drove the vehicle" and that he had recently been stopped during a routine traffic stop, he similarly did not own the vehicle. *Id.*,

STATE v. ROGERS

[251 N.C. App. 869 (2017)]

2016 WL 7100567, at *1, 2016 N.C. App. LEXIS 1191, at *3. Unlike this case, there was no evidence that law enforcement was already investigating the defendant for selling controlled substances or that they had reason to believe that the defendant was keeping drugs in the vehicle prior to his arrest. *Id.*

This Court distinguished *Rousseau* from prior cases due to the “additional” evidence “that a controlled substance was hidden in a storage space in the engine compartment, and that remnants of this controlled substance were found throughout the interior.” *Id.*, 2016 WL 7100567, at *2, 2016 N.C. App. LEXIS 1191, at *6. This Court also noted:

Furthermore, the evidence tended to show that the vehicle was most recently used to facilitate a breaking and entering, not anything related to the controlled substance. From this evidence, the jury could infer that the vehicle was being used for the “keeping” of a controlled substance. Therefore, the trial court was correct in denying Defendant’s motion to dismiss.

Id., 2016 WL 7100567, at *3, 2016 N.C. App. LEXIS 1191, at *8. I believe that the majority’s analysis of this issue in *Rousseau* was correct, although I also note that there was a dissent and the defendant filed a notice of appeal to our Supreme Court on that basis on 9 January 2017.

Here, there is no issue of whether defendant had constructive possession of the cocaine found in the gas cap, since that was determined by his conviction for possession with intent to manufacture, sell, or deliver cocaine. All of the evidence, viewed collectively and in the light most favorable to the State, suggests that defendant had made use of the vehicle for at least an hour and a half prior to his arrest – or possibly even since May of 2013 – and that on the day in question, his use was exclusive. At some time prior to his arrest and the hour and a half surveillance of defendant before the arrest, he hid cocaine behind the gas cap, where he was “keeping” it. These facts suggest that defendant was “keep[ing]” the vehicle and did so for the purpose of “keeping” controlled substances, namely the cocaine found in the gas cap. N.C. Gen. Stat. § 90-108(a)(7). I would therefore hold that the trial court did not err in denying defendant’s motion to dismiss the charge of maintaining a vehicle for the keeping or selling of a controlled substance.

STATE v. WILSON-ANGELES

[251 N.C. App. 886 (2017)]

STATE OF NORTH CAROLINA

v.

RACHEL SHERI WILSON-ANGELES

No. COA16-677

Filed 7 February 2017

1. Evidence—prior bad act—admissible

The trial court did not err in an arson prosecution by admitting evidence of a prior arson where the evidence was sufficiently similar, logically relevant, and not too remote in time. The trial court did not abuse its discretion by determining that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence, given the similarities of the two incidents and the trial court's deliberate determination of the admissibility of the testimony.

2. Criminal Law—defenses—voluntary intoxication—evidence not sufficient

Defendant was not entitled to a voluntary intoxication instruction in an arson prosecution where there was evidence that defendant was intoxicated to some degree, but the evidence did not establish how much alcohol defendant had consumed prior to committing the crime or the length of time over which defendant had consumed alcohol. The uncertainty about defendant's level of intoxication plus defendant's purposeful manner of carrying out the crime and her reaction when law enforcement approached her did not support the conclusion that defendant was so completely intoxicated as to be utterly incapable of forming the requisite intent.

3. Sentencing—prior record level—notice

The trial court erred by adding a prior record level point attributable to the time she spent on probation, parole, or post supervision where the State failed to give proper notice of its intention to use the probation point in the calculation of defendant's sentence.

4. Appeal and Error—mandate—issued immediately upon filing

Pursuant to N.C. R. App. P. 32(b), the Court of Appeals directed that the mandate issue immediately upon the filing of an opinion where there was an error in sentencing and the possibility that defendant would be entitled to immediate release on resentencing because she would have served her entire sentence.

STATE v. WILSON-ANGELES

[251 N.C. App. 886 (2017)]

Appeal by Defendant from judgment entered 9 October 2014 by Judge Tanya T. Wallace in Superior Court, Iredell County. Heard in the Court of Appeals 9 January 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General James M. Stanley, Jr., for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jon H. Hunt, for Defendant.

McGEE, Chief Judge.

Rachel Sheri Wilson-Angeles (“Defendant”) appeals from judgment entered after a jury found her guilty of attempted first-degree arson and being intoxicated and disruptive in public.

I. Background

Defendant was casually talking to her neighbor, Sharon Houston (“Houston”), outside Houston’s apartment in their apartment complex in Mooresville, North Carolina, just before midnight on 20 December 2011. The two had been neighbors for a few years, and were known to occasionally visit and talk with each other in the evenings. That evening, Defendant had been drinking, and “flipped out.” Defendant began cursing at Houston and accusing her of being responsible for Defendant’s children being taken away from her. After a brief physical altercation, Houston retreated into her apartment and locked the door. About five minutes later, Houston heard a commotion just outside her door. Houston peered through the peephole, and observed Defendant outside with a Mad Dog 20-20 bottle (a brand of fortified wine) in her hand. A rag was protruding from the bottle, effectively making a “Molotov cocktail,” that Defendant lit and threw against Houston’s door. Houston testified at trial that she heard a “whoosh” sound as the flame “went up.” Houston also heard Defendant “cussing” and “saying she was going to burn me out.” Houston called 911.

As Houston waited for law enforcement to arrive, she went outside her apartment to assess the damage. The fire had gone out on its own, leaving behind black soot, roughly three inches in diameter, on the brick wall near her front door. Houston swept up the pieces of broken glass from the bottle and disposed of them in the trash. When law enforcement arrived at the apartment complex, they immediately observed a woman, later identified as Defendant, yelling obscenities and loudly proclaiming

STATE v. WILSON-ANGELES

[251 N.C. App. 886 (2017)]

she “was the victim.” As law enforcement approached Defendant, she quickly handed a container she was holding to another person, who poured out the liquid. Despite the liquid being poured out, the container had a strong odor of alcohol. Defendant claimed to law enforcement that she was bleeding, and repeatedly attempted to remove her clothing to show the officers her injuries. One of the officers who encountered Defendant, Officer Brian Plyler (“Officer Plyler”), noticed a strong odor of alcohol emanating from Defendant’s mouth, and observed that she appeared “extremely intoxicated.” Defendant was, according to Officer Plyler, screaming at a large group of people who had assembled to witness the spectacle, and it seemed to him that Defendant was attempting to “incite more violence.” Based on these observations, Officer Plyler placed Defendant under arrest for being intoxicated and disruptive in public. During the ride to the police station, and while at the station, Defendant exhibited other signs of being intoxicated, including inexplicably singing hymns, repeatedly claiming to be the victim, and later passing out at the police station.

Subsequent to Defendant’s arrest, Officer Plyler’s superior, Captain Joseph Cooke (“Captain Cooke”), talked with Houston. Houston described the physical altercation between herself and Defendant, and told Captain Cooke about Defendant’s attempt to start a fire at her front door. Captain Cooke explained at trial what he observed at Houston’s front door:

I saw broken glass from what looked like a bottle had been shattered on the door. There was liquid on the door. There was also carbon mark or a charring – not really charring, but a mark about three inches in diameter on the concrete in front of her door that I had could see that something had just been recently burned. Basically it looked like, you know, bottle was thrown on the bottom of her door, shattered, and liquid was all over the place, and something had been tried to set on fire.¹

Based on his observations and conversation with Houston, Captain Cooke instructed the other officers to also charge Defendant with attempted first-degree arson.

Defendant’s trial began on 7 October 2014. During the course of the trial, the State sought to introduce the testimony of three witnesses

1. We note the discrepancy between Captain Cooke’s and Houston’s testimony: Captain Cooke asserted he observed the broken glass, while Houston repeatedly maintained she cleaned up the glass before law enforcement arrived.

STATE v. WILSON-ANGELES

[251 N.C. App. 886 (2017)]

– Jason Workman, Chris Jorgenson, and Gary Styers (“the 404(b) witnesses”) – who were to testify regarding Defendant’s perpetration (or attempted perpetration) of two prior arsons, both occurring at properties in Mooresville, North Carolina in August 2008: one at a property on Main Street (the “Main Street Arson”), and another at a property on Mills Street (the “Mills Street Arson”).

After *voir dire* of the 404(b) witnesses, the trial court ruled that evidence regarding the Mills Street Arson was relevant, but its probative value was outweighed by its unduly prejudicial effect, rendering it inadmissible pursuant to N.C. Gen. Stat. § 8C-1, Rule 403. The trial court further ruled that the testimony regarding the Main Street Arson was relevant and would be admitted pursuant to N.C. Gen. Stat. § 8C-1, Rule 404(b) for the sole purpose of showing Defendant’s intent to commit arson. In so ruling, the trial court also held that evidence of the Main Street Arson was more probative than prejudicial, and admissible pursuant to N.C.G.S. § 8C-1, Rule 403. Defendant was found guilty of attempted first-degree arson and being intoxicated and disruptive in public. The trial court determined Defendant to be a prior record level III offender for sentencing purposes, and sentenced her to a prison term of thirty to forty-eight months. Defendant appeals.

II. Analysis

Defendant argues the trial court erred by: (1) admitting evidence, pursuant to N.C. Gen. Stat. §§ 8C-1, Rules 401, 403 and 404(b), that she had previously committed the Main Street Arson; and (2) by including Defendant’s probation, parole, or post-release supervision in her prior record level calculation for sentencing purposes in violation of N.C. Gen. Stat. § 15A-1340.16(a6)’s notice requirements. Defendant also argues that she received ineffective assistance of counsel when her trial counsel failed to request a jury instruction on voluntary intoxication.

A. Admission of Prior Bad Acts to Show Intent

[1] Defendant argues the trial court erred in admitting evidence of the Main Street Arson, and that the admission of this evidence violated N.C. Gen. Stat. §§ 8C-1, Rules 401, 403, and 404(b). We address these arguments together.

Rule 404(b) of the North Carolina Rules of Evidence provides, in relevant part:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be

STATE v. WILSON-ANGELES

[251 N.C. App. 886 (2017)]

admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2015). Rule 404(b) has been characterized as a “clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant.” *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990) (emphasis in original). This clear rule of inclusion is “subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.” *Id.* (emphases in original). Despite these sweeping and inclusive statements, our Supreme Court has also stated that Rule 404(b) is “consistent with North Carolina practice prior to [the Rule’s] enactment.” *State v. Carpenter*, 361 N.C. 382, 386, 646 S.E.2d 105, 109 (2007) (citation and quotation marks omitted). “Before the enactment of Rule 404(b), North Carolina courts followed the general rule that in a prosecution for a particular crime, the State *cannot offer evidence* tending to show that the accused has committed another distinct, independent, or separate offense.” *Id.* (emphasis added) (citation, ellipsis, and brackets omitted). Attempting to reconcile these seemingly disparate commands, our Supreme Court has stated that “while we have interpreted Rule 404(b) broadly, we have also long acknowledged that evidence of prior convictions must be carefully evaluated by the trial court.” *Id.* at 387, 646 S.E.2d at 109.

When determining whether evidence of a prior crime or bad act is admissible under Rule 404(b), two considerations are paramount:

Though it is a rule of inclusion, Rule 404(b) is still constrained by the requirements of similarity and temporal proximity. Prior acts are sufficiently similar if there are some unusual facts present in both crimes that would indicate that the same person committed them. We do not require that the similarities rise to the level of the unique and bizarre.

State v. Beckelheimer, 366 N.C. 127, 131, 726 S.E.2d 156, 159 (2012) (citation and quotation marks omitted). While cases examining the admissibility of evidence under Rule 404(b) often focus exclusively on similarity and temporal proximity, we remain cognizant that Rule 404(b) “is, at bottom, one of relevancy.” *State v. Jeter*, 326 N.C. 457, 459, 389 S.E.2d 805, 807 (1990); *accord Carpenter*, 361 N.C. at 388, 646 S.E.2d at 110 (“In light of the perils inherent in introducing prior crimes under Rule 404(b),

STATE v. WILSON-ANGELES

[251 N.C. App. 886 (2017)]

several constraints have been placed on the admission of such evidence. Our Rules of Evidence require that in order for the prior crime to be admissible, it must be relevant to the currently alleged crime.” (citing N.C.G.S. § 8C-1, Rule 401)).

“When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling, . . . we look to whether the evidence supports the findings and whether the findings support the conclusions.” *Beckelheimer*, 366 N.C. at 159, 726 S.E.2d at 159. “We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b).” *Id.* The trial court made the following oral findings of fact regarding the admissibility of testimony related to the Main Street Arson²:

The State’s 404(b) evidence would show the following. That in August of 2008 the Defendant used gasoline to set fire to a home at 600 – on the 600 block of Main Street in Mooresville during the nighttime hours. Actually earlier to – closer to morning. That this gas was purchased at a nearby Pantry gas station. That the Defendant tried to set the fire with [cigarettes] but ultimately succeeded with a lighter. That she knew that the home was inhabited because she saw a vehicle belonging to [the homeowner]. [The homeowner] had, according to the Defendant, beat her while his father watched and done nothing at the time of this beating. It’s unclear whether the beating – when this beating allegedly occurred. Sometime in the month to a year before.

A K-9 trained in fires sniffed to locate possible incendiary material. Two pieces of wood were retrieved by the Fire Marshal and sent to a lab which turned out positive for gasoline. [Defendant] did not report the assault by [the homeowner] to the police at any time. [Defendant] admitted to drinking [Peach] Mad Dog 20-20 Vodka [, drinking several Bud Lights,] and also taking prescription [Clonozapine] pills which were prescribed to her. This

2. At the time the trial court made these oral findings of fact and conclusions of law, it declared the ruling to be a “very rough copy of the ruling,” and that it would “look at it and make [the ruling] prettier as the week [went] on.” Despite this statement, no revised copy of the trial court’s ruling (oral or written) appears in the transcript or record on appeal. Immediately following the trial court’s ruling, several minor factual errors were brought to the court’s attention by the State and agreed to by Defendant. For clarity and ease of reading, we have removed the erroneous information and placed the correct information in brackets.

STATE v. WILSON-ANGELES

[251 N.C. App. 886 (2017)]

fire was at the regular entrance way to the building – to the house or apartment. As in the instant case the fire was on the outside which, according to the Fire Marshal, makes it harder to detect by those inside. The damage in [the Main Street Arson] was much more extensive as shown by pictures introduced by the State.

Unlike the instant case, the Defendant in [the Main Street Arson], her involvement, and also unlike the instant case, there's no real timeline between the beating and the fire. In the 2008 August case with – on Main Street, there was a Department of Social Services correlation in that apparently the Defendant was upset because her two year old had suffered a cut for which she believes the Department of Social Services blames her. The cut was treated on the Friday before the fire purportedly happened on the following early hours of Sunday morning. Unlike the instant case, the [Main Street Arson] appears planned, at least to the extent of purchasing gasoline and also the Defendant had another person with her.

....

In [both the Main Street Arson and the Mills Street Arson], we find temporal closeness to the actual event for which we are trying the Defendant. Both events occurred within four years of this incident. In each of these cases – in all three cases there is evidence of use of incendiary materials and attempted burning at night in Mooresville in retaliation for a perceived wrong by the person or persons occupying a home. And in each case the Defendant claims to have been a victim but not follow through with police involvement or government involvement in assisting her to lawfully address the wrong but instead addresses it herself.

After making these findings of fact, the trial court made the following oral conclusion of law regarding the admissibility of testimony related to the Main Street Arson:

The State has offered [evidence regarding the Main Street Arson] as evidence of – allowed by 404(b), identity, intent, common scheme, plan, or motive. The Court will allow it to show intent. Finding that in both cases the commonalities are that they happened – each happened in Mooresville in

STATE v. WILSON-ANGELES

[251 N.C. App. 886 (2017)]

the nighttime hours using an incendiary method; and the Court notes that fire is an unusual incendiary – unusual attack . . . – well, attack method. That they each occurred against – at an entrance way which appears to be either the only entrance way or most common entrance way to the apartments against persons that the Defendant knew to be within. That she knew the buildings to be occupied, and that she had some grievance with or perceived harm from, and which she believed to be the victim; and on each occasion she was impaired by alcohol or some controlled substances in addition to alcohol. And she never reported such to the police. And in that occasion the probative value outweighs any prejudice to the Defendant.

After review of the transcript of the proceedings and the trial court's findings and conclusions, we are convinced that the evidence presented during *voir dire* by the three 404(b) witnesses supports the trial court's findings of fact, which support the conclusion that the evidence was probative of Defendant's intent, rendering the evidence admissible pursuant to Rule 404(b). As found by the trial court, the Main Street Arson and the present case contained key similarities. Both arsons occurred in Mooresville during the nighttime hours, and both were set on the exterior of a building at a regular entranceway. In both cases, the perpetrator was intoxicated, knew the buildings to be occupied, and was angry about a "perceived harm" perpetrated against Defendant by the occupant of the residence. While Defendant, in her brief to this Court, has pointed to various differences between the Main Street Arson and the present case, we must not "focus[] on the differences between the [prior and current] incidents," but rather "review[] the[] similarities noted by the trial court." *Beckelheimer*, 366 N.C. at 160, 726 S.E.2d at 159 (citation omitted). Reviewing those similarities here, we conclude the unusual facts of the two incidents are sufficiently similar to be admissible pursuant to Rule 404(b).

We also find the evidence of the Main Street Arson to be logically relevant to Defendant's intent to commit the present crime. Defendant admitted to perpetrating the Main Street Arson, and both crimes displayed the similarities discussed above. The fact that Defendant attempted to commit arson at night, in the same town, and against a person from whom she had experienced a "perceived harm" logically bears on Defendant's intent to commit arson in similar circumstances in the present case.

STATE v. WILSON-ANGELES

[251 N.C. App. 886 (2017)]

On the issue of temporal proximity, the Main Street Arson occurred approximately four years before the present incident. Cases from our Supreme Court have upheld the admissibility of 404(b) evidence with significantly longer periods between the past and present incidents. *E.g.*, *State v. Carter*, 338 N.C. 569, 588-89, 451 S.E.2d 157, 167-68 (1994) (affirming admissibility of 404(b) evidence of prior crime despite an eight-year lapse between assaults), *cert. denied*, 515 U.S. 1107, 132 L. Ed. 2d 263 (1995). Considering that temporal proximity “is less significant when the prior conduct is used to show intent,” we hold that the four-year gap between incidents does not affect the admissibility of the Main Street Arson evidence. *State v. Locklear*, 363 N.C. 438, 448, 681 S.E.2d 293, 302 (2009) (holding that “remoteness in time generally affects only the weight to be given such evidence, not its admissibility”).

Having determined that the 404(b) evidence was sufficiently similar, logically relevant, and not too remote in time, we now review the trial court’s Rule 403 determination. As relevant to this case, a trial court may exclude relevant evidence under Rule 403 “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]” N.C. Gen. Stat. § 8C-1, Rule 403 (2015). A trial court’s Rule 403 determination is reviewed for abuse of discretion. *Beckelheimer*, ___ N.C. at ___, 726 S.E.2d at 160. A review of the record in the present case reveals that the trial court was aware of the potential danger of unfair prejudice to Defendant, and excluded evidence of the Mills Street Arson under Rule 403.

The trial court heard the testimony of the 404(b) witnesses outside the presence of the jury, considered the arguments of counsel, ruled on the admissibility of the evidence, and gave a proper limiting instruction to the jury for the Main Street Arson evidence admitted under Rule 404(b). Given the similarities between the Main Street Arson and the present case, and the trial court’s deliberate determination of the admissibility of the 404(b) witnesses’ testimony, we conclude that it was not an abuse of discretion for the trial court to determine that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence. *See id.*; *see also State v. Higgs*, 348 N.C. 377, 406, 501 S.E.2d 625, 642 (1998).

B. Ineffective Assistance of Counsel

[2] Defendant argues that she received ineffective assistance of counsel when her trial counsel declined to request a jury instruction on voluntary intoxication based upon counsel’s misapprehension of the law. Generally, “claims of ineffective assistance of counsel should be

STATE v. WILSON-ANGELES

[251 N.C. App. 886 (2017)]

considered through motions for appropriate relief and not on direct appeal.” *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001). However, an ineffective assistance of counsel claim brought on direct review “will be decided on the merits when the cold record reveals that no further investigation is required[.]” *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001). “[O]n direct appeal, the reviewing court ordinarily limits its review to material included in the record on appeal and the verbatim transcript of proceedings, if one is designated.” *Id.* at 167, 557 S.E.2d at 524-25 (citation and quotation marks omitted). Here, the record on appeal and transcript of the proceedings suffice to show that Defendant’s ineffective assistance of counsel claim is without merit; we therefore decide the claim on the merits on direct review.

In order to show ineffective assistance of counsel, a defendant must satisfy the two-prong test announced by the Supreme Court of the United States in *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693, (1984). This test for ineffective assistance of counsel has been explicitly adopted by our Supreme Court for state constitutional purposes in *State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985). Pursuant to *Strickland*:

First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

466 U.S. at 687, 80 L. Ed. 2d at 693; *accord Braswell*, 312 N.C. at 561-62, 324 S.E.2d at 248. “The fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel’s errors, there would have been a different result in the proceedings.” *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248 (citation omitted). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698. Therefore, “if a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel’s alleged errors the result of the proceeding would

STATE v. WILSON-ANGELES

[251 N.C. App. 886 (2017)]

have been different, then the court need not determine whether counsel's performance was actually deficient." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 249. "[T]o establish prejudice, a 'defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *State v. Poindexter*, 359 N.C. 287, 291, 608 S.E.2d 761, 764 (2005) (quoting *Wiggins v. Smith*, 539 U.S. 510, 534, 156 L. Ed. 2d 471, 493 (2003)).

Defendant claims her trial counsel rendered ineffective assistance when counsel declined to request a jury instruction on voluntary intoxication because counsel believed the defense was required to present evidence before being entitled to request such an instruction. Presuming counsel's performance was deficient for incorrectly asserting that Defendant was not entitled to ask for a voluntary intoxication instruction without presenting some evidence, Defendant cannot show there to be a "reasonable probability" that the result of the trial would have been different, because Defendant was not entitled to a voluntary intoxication instruction, had one been requested.

Voluntary intoxication in and of itself is not a legal excuse for a criminal act. *State v. Gerald*, 304 N.C. 511, 521, 284 S.E.2d 312, 318 (1981). It is only a viable defense "if the degree of intoxication is such that a defendant could not form the specific intent required for the underlying offense." *State v. Golden*, 143 N.C. App. 426, 430, 546 S.E.2d 163, 166 (2001). Before the trial court will be required to instruct on voluntary intoxication, a defendant must "produce substantial evidence which would support a conclusion by the trial court that at the time of the crime for which he is being tried defendant's mind and reason were so completely intoxicated and overthrown as to render him *utterly incapable* of forming the requisite specific intent." *State v. Ash*, 193 N.C. App. 569, 576, 668 S.E.2d 65, 70-71 (2008) (emphasis added) (citation and quotation marks omitted). "In the absence of some evidence of intoxication to such degree, the court is not required to charge the jury thereon." *Id.* at 576, 668 S.E.2d at 71. The evidence must be viewed in the light most favorable to the defendant, *e.g.* *State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988), and a defendant is entitled to rely exclusively on the evidence produced by the State. *See, e.g., State v. Herring*, 338 N.C. 271, 275, 449 S.E.2d 183, 186 (1994) ("A defendant who wants to raise the issue of whether he was so intoxicated by the voluntary consumption of alcohol or other drugs that he did not form a deliberate and premeditated intent to kill has the burden of producing evidence,

STATE v. WILSON-ANGELES

[251 N.C. App. 886 (2017)]

or relying on the evidence produced by the state, of his intoxication." (emphasis added) (citation and quotation marks omitted)).

In the present case, Defendant argues that the evidence produced by the State was sufficient to entitle her to a voluntary intoxication instruction. To support her argument, Defendant points to various behaviors exhibited by Defendant on the night in question, including, *inter alia*, yelling profanities, inexplicably singing hymns, claiming to be the victim, attempting to take her shirt off to show law enforcement an injury, and passing out at the police department. While the evidence shows Defendant was intoxicated to some degree on 20 December 2011, we believe the evidence was insufficient to entitle her to a voluntary intoxication instruction.

The evidence presented by the State did not establish how much alcohol Defendant had consumed prior to committing the crime at issue, which case law suggests is information of significant consequence to the determination of whether a defendant is entitled to a voluntary intoxication instruction. *See Ash*, 193 N.C. App. at 576, 668 S.E.2d at 71-72 (concluding that a defendant was not entitled to a voluntary intoxication instruction when "there was no evidence as to exactly how much [intoxicating substance] he consumed prior to the commission of the crime at issue"). Nor did the State's evidence tend to show the length of time over which Defendant had consumed alcohol before committing the attempted arson in this case, a showing which must be made before a defendant is entitled to the instruction. *See State v. Geddie*, 345 N.C. 73, 95, 478 S.E.2d 146, 157 (1996), *cert. denied*, 522 U.S. 825, 139 L. Ed. 2d 43 (1997) (concluding that "[e]vidence tending to show only that defendant drank some unknown quantity of alcohol over an indefinite period of time before the [crime] does not satisfy the defendant's burden of production" necessitating a voluntary intoxication instruction). The evidence presented in the present case revealed only that Defendant had consumed some amount of some type of alcohol over some unknown period of time prior to attempting arson. While Defendant's level of consumption before committing the crime is unknown, the evidence did establish that Defendant consumed some amount of alcohol after committing the attempted arson but before encountering law enforcement: at the time law enforcement approached Defendant, she had in her possession a "sports drink container" which had a "strong odor of alcoholic beverage."

Defendant also took deliberate actions that suggest a clear purpose in carrying out the attempted arson. After engaging in a physical altercation with Houston, Defendant: (1) obtained a Mad Dog 20-20 bottle, a rag, and a lighter; (2) placed the rag partially into the bottle to form a

STATE v. WILSON-ANGELES

[251 N.C. App. 886 (2017)]

“Molotov cocktail;” (3) lit the rag and threw the bottle at Houston’s door; (4) exclaimed her desire to “burn [Houston] out,” and (5) subsequently left the scene. These actions were not instantaneous and required Defendant to leave the scene, gather supplies, and return to Houston’s door to carry out the crime. In addition to actions directly related to the attempted arson, when law enforcement approached Defendant, she quickly handed a container containing an alcoholic beverage to another person, indicating at least some level of awareness of her surroundings. *See State v. Long*, 354 N.C. 534, 538-39, 557 S.E.2d 89, 93 (2001) (stating that steps “designed to hide the defendant’s participation” in the crime demonstrates the ability to “plan and think rationally” and shows that the defendant was not so intoxicated that intent could not be formed); *see also State v. Lemons*, 225 N.C. App. 266, 736 S.E.2d 647, 2013 N.C. App. LEXIS 41, *12-13 (2013) (unpublished) (noting that a voluntary intoxication instruction was not warranted when the defendant “acted with a clear purpose and intent in carrying out” the crime).

While the behavior exhibited by Defendant, and cited by her appellate counsel to highlight her level of intoxication, was indeed bizarre, our courts have held that “a person may be excited, intoxicated and emotionally upset, and still have the capability to formulate the necessary plan, design, or intention.” *Mash*, 323 N.C. at 347, 372 S.E.2d at 537 (citation and quotation marks omitted). While the evidence presented was sufficient to show Defendant was intoxicated to some degree, “[e]vidence of mere intoxication . . . is not enough.” *Id.* at 346, 372 S.E.2d at 536. Given the lack of any evidence regarding Defendant’s level of alcohol consumption on 20 December 2011 before committing the attempted arson, the uncertainty surrounding how quickly Defendant consumed that alcohol, the evidence establishing that Defendant was consuming alcohol after committing the attempted arson but before encountering law enforcement, evidence of a purposeful manner of carrying out the attempted arson, and evidence showing Defendant quickly handed off a container of alcohol as law enforcement approached her, indicating some level of awareness of her surroundings, we conclude that the evidence did not support a conclusion that Defendant was “so completely intoxicated and overthrown as to render [her] utterly incapable of forming the requisite specific intent.” *Ash*, 193 N.C. App. at 576, 668 S.E.2d at 70-71. Defendant was, therefore, not entitled to a voluntary intoxication instruction.

While a claim of ineffective assistance of counsel will be dismissed without prejudice when the claim has been “prematurely asserted on direct appeal,” *State v. Warren*, ___ N.C. App. ___, ___, 780 S.E.2d 835,

STATE v. WILSON-ANGELES

[251 N.C. App. 886 (2017)]

841-42 (2015), dismissal without prejudice is not appropriate when the “cold record reveals that no further investigation is required[.]” *Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001). In the present case, no further investigation into Defendant’s ineffective assistance of counsel claim is required; the cold record reveals all of the evidence and testimony that was presented at trial regarding Defendant’s level of intoxication, and shows that the evidence presented by the State fell short of the exacting standard our case law requires before entitling a defendant to a jury instruction on voluntary intoxication. *E.g. Mash*, 323 N.C. at 347, 372 S.E.2d at 536-37; *Geddie*, 345 N.C. at 95, 478 S.E.2d at 157; *Ash*, 193 N.C. App. at 576, 668 S.E.2d at 71-72. As Defendant was not entitled to a voluntary intoxication instruction, she has failed to show “that in the absence of counsel’s alleged errors the result of the proceeding would have been different[.]” *Braswell*, 312 N.C. at 563, 324 S.E.2d at 249. We therefore reject Defendant’s claim of ineffective assistance of counsel.

C. Prior Record Level Calculation

[3] Defendant contends the trial court erred in adding a prior record level point to her prior record level calculation for sentencing purposes attributable to the time she spent on probation, parole, or post supervision. She argues the State failed to give proper notice of its intention to use the probation point in the calculation of her sentence, as required by N.C. Gen. Stat. § 15A-1340.16(a6). We agree.

“The determination of an offender’s prior record level is a conclusion of law that is subject to *de novo* review on appeal.” *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009) (citing *State v. Fraley*, 182 N.C. App. 683, 691, 643 S.E.2d 39, 44 (2007)). Pursuant to North Carolina’s felony sentencing system, the prior record level of a felony offender is determined by assessing points for prior crimes using the method delineated in N.C. Gen. Stat. § 15A-1340.14(b)(1)-(7). *See generally* N.C. Gen. Stat. §§ 15A-1340.14(a)-(b) (2015). As relevant to the present case, a trial court sentencing a felony offender may assess one prior record level point “[i]f the offense was committed while the offender was on supervised or unsupervised probation, parole, or post-release supervision[.]” N.C. Gen. Stat. § 15A-1340.14(b)(7) (2015). Prior to being assessed a prior record level point pursuant to N.C.G.S. § 15A-1340.14(b)(7), however, our General Statutes require the State to provide written notice of its intent to do so:

The State must provide a defendant with written notice of its intent to prove the existence of . . . a prior record level point under G.S. 15A-1340.14(b)(7) at least 30 days

STATE v. WILSON-ANGELES

[251 N.C. App. 886 (2017)]

before trial or the entry of a guilty or no contest plea. A defendant may waive the right to receive such notice. The notice shall list all the aggravating factors the State seeks to establish.

N.C. Gen. Stat. § 15A-1340.16(a6) (2015).

In the present case, the parties agreed, in a stipulation in the record on appeal, to the following:

[The assistant district attorney] informed appellate counsel for [Defendant] that she gave notice of the State's intent to seek an extra point in the determination of [Defendant's] prior record level by including a copy of an AOC-CR-600 form . . . with the discovery materials [the assistant district attorney] provided to the attorneys who represented [Defendant] in Iredell County Superior Court. The form . . . contain[ed] contain[ed] a handwritten '+1' in the space beside the cell captioned "if the offense was committed: (a) while on supervised or unsupervised probation, parole, or post-release supervision." . . . The [assistant district attorney] stated this is the standard manner the Iredell County District Attorney's Office provides notice of the State's intent to seek an additional prior record level point when an offense has been committed during a period in which the defendant was on probation.

In addition to this stipulation, the following exchange occurred between the trial court and the prosecutor regarding whether Defendant had received notice of the State's intent to seek an extra prior record level point:

THE COURT: And the extra point was noticed?

[Prosecutor]: Yes, Ma'am. I gave them notice of that. I mean I provided that to [Defendant's counsel] in discovery.

THE COURT: All right.

This Court recently held in a factual situation similar to the present case, that the State's notice of its intent to prove a prior record level point authorized by N.C. Gen. Stat. § 15A-1340.14(b)(7) by including a prior record level worksheet in discovery materials is insufficient to meet N.C.G.S. § 15A-1340.16(a6)'s notice requirement. *See State v. Crook*, ___ N.C. App. ___, 785 S.E.2d 771 (2016). In *Crook*, the defendant argued the trial court erred by including the probation, parole, or

STATE v. WILSON-ANGELES

[251 N.C. App. 886 (2017)]

post-release supervision point and sentencing him as a prior record level II offender because the State did not provide him with notice of intent under N.C.G.S. § 15A-1340.16(a6). *Crook*, ___ N.C. App. at ___, 785 S.E.2d at 780.

In response, the State contended that the “defendant’s prior record level worksheet was made available to [him] in discovery . . . more than 30 days prior to the trial” and that, as such, “the defendant was provided notice of his prior record level calculation of a prior record level II with two prior record level points[.]” *Id.* In rejecting this argument, this Court held that including a prior record level worksheet during discovery “[a]t most . . . constituted a possible calculation of [the d]efendant’s prior record level and did not provide affirmative notice that the State intended to prove the existence of the prior record point authorized by N.C. Gen. Stat. § 15A-1340.14(b)(7) as required by N.C. Gen. Stat. § 15A-1340.16(a6).” *Crook*, ___ N.C. App. at ___, 785 S.E.2d at 780 (citation omitted). This court noted that “the State had the ability to comply with the statute using regular forms promulgated for this specific purpose by the Administrative Office of the Courts.” *Id.* (citation and quotation marks omitted).

Pursuant to this Court’s recent holding in *Crook*, the State must provide a defendant with notice of intent to prove the existence of a prior record level point authorized by N.C.G.S. § 15A-1340.14(b)(7) at least thirty days prior to trial, and must provide notice of its intent in some manner other than including a prior record level worksheet in the discovery documents made available to a defendant. In the present case, notice to Defendant was lacking, as the State only communicated its intent to prove the aggravating factor by including a handwritten notation on a form provided through discovery. This notation “[a]t most. . . constituted a possible calculation of Defendant’s prior record level and did not provide affirmative notice that the State intended to prove the existence of the prior record point[.]” *Crook*, ___ N.C. App. at ___, 785 S.E.2d at 780 (citation omitted). The fact that there was a short exchange between the prosecutor and the trial court in no way changes this calculus, because no separate notice was provided to Defendant as required by *Crook*. Although Defendant failed to object at trial to the State’s failure to provide notice, “[i]t is not necessary that an objection be lodged at the sentencing hearing in order for a claim that the record evidence does not support the trial court’s determination of a defendant’s prior record level to be preserved for appellate review.” *Bohler*, 198 N.C. App. at 633, 681 S.E.2d at 804.

STATE v. WILSON-ANGELES

[251 N.C. App. 886 (2017)]

The State's argument that *State v. Snelling*, 231 N.C. App. 676, 752 S.E.2d 739 (2014) controls the present case and requires an opposite conclusion is unavailing. In *Snelling*, the defendant argued, *inter alia*, that the trial court erred by sentencing him as a higher prior record level offender because it failed to comply with the sentencing procedure mandated by N.C. Gen. Stat. § 15A-1022.1. *Snelling*, 231 N.C. App. at 680-81, 752 S.E.2d at 743. N.C.G.S. § 15A-1022.1 requires a trial court to inform a defendant of his or her right to have a jury determine the existence of an aggravating factor, and the right to prove the existence of any mitigating factor. *Snelling*, 231 N.C. App. at 680, 752 S.E.2d at 743; N.C. Gen. Stat. § 15A-1022.1 (2015). After examining the statute and the facts of the case, the *Snelling* Court held that because the defendant stipulated to his prior record level status, such status was a "non-issue." *Snelling*, 231 N.C. App. at 681-82, 752 S.E.2d at 744. "Within the context of defendant's sentencing hearing," the Court reasoned, "the procedures specified by N.C. Gen. Stat. § 15A-1022.1 would have been inappropriate." *Snelling*, 231 N.C. App. at 682, 752 S.E.2d at 744 (citation omitted).

The State argues that, like in *Snelling*, Defendant's prior record level status was a non-issue, and she "waived any requirement for notice pursuant to N.C. Gen. Stat. § 15A-1340.16(a6) by failing to respond to the trial court's direct inquiry as to whether the extra point was noticed." This argument fails for several reasons.

First, the "trial court's direct inquiry" regarding notice was not directed at Defendant or her counsel; rather, it was a conversation between the trial court and the prosecutor. Second, to hold that Defendant's argument was waived would contravene this Court's longstanding precedent that an objection is not necessary in order to preserve a "claim that the record evidence does not support the trial court's determination of a defendant's prior record level[.]" *Bohler*, 198 N.C. App. at 633, 681 S.E.2d at 804. Third, the portion of *Snelling* on which the State relies was discussing N.C.G.S. § 15A-1022.1, a separate statute from the one at issue in the present case, N.C.G.S. § 15A-1340.16(a6). The purposes of these two statutes are very different: N.C.G.S. § 15A-1022.1 deals with sentencing procedure to be followed by the *sentencing judge*, while N.C.G.S. § 15A-1340.16(a6) deals with notice *the State* must provide to a defendant of its intent to prove a fact which will increase his or her sentence. Finally, after the *Snelling* Court addressed, and dismissed, the defendant's argument related to N.C.G.S. § 15A-1022.1, the Court *agreed with the defendant* that N.C.G.S. § 15A-1340.16(a6)'s notice requirements had been violated, and that violation required a new sentencing hearing. *See Snelling*, 231 N.C. App. at 682, 752 S.E.2d at 744 ("Here, the trial court

STATE v. WILSON-ANGELES

[251 N.C. App. 886 (2017)]

never determined whether the statutory requirements of N.C. Gen. Stat. § 15A-1340.16(a6) were met. Additionally, there is no evidence in the record to show that the State provided sufficient notice of its intent to prove the probation point. Moreover, the record does not indicate that defendant waived his right to receive such notice.”).

[4] Under this Court’s holding in *Crook*, the notice provided to Defendant in the present case was insufficient to meet the notice requirements of N.C.G.S. § 15A-1340.16(a6), and the record does not indicate Defendant waived her right to such notice. Accordingly, the trial court erred in sentencing Defendant as a prior record level III offender. We therefore vacate Defendant’s sentence and remand this case for Defendant to be resentenced as a prior record level II offender. As Defendant has noted in briefing to this Court, there is at least some possibility that, upon resentencing, Defendant may be entitled to her immediate release because she would have served her entire sentence. We express no opinion on resentencing or on Defendant’s proper sentence. However, due to this possibility and to hasten Defendant’s resentencing, we direct, pursuant to N.C. R. App. P. 32(b), that the mandate issue immediately upon the filing of this opinion.

NO ERROR IN PART; JUDGMENT VACATED; REMANDED FOR RESENTENCING.

Judges STROUD and TYSON concur.

T & A AMUSEMENTS, LLC v. McCrory

[251 N.C. App. 904 (2017)]

T AND A AMUSEMENTS, LLC; AND CRAZIE OVERSTOCK
PROMOTIONS, LLC, PLAINTIFFS

v.

PATRICK MCCRORY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NORTH CAROLINA;
FRANK L. PERRY, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE NORTH CAROLINA DEPARTMENT
OF PUBLIC SAFETY; MARK J. SENTER, IN HIS OFFICIAL CAPACITY AS BRANCH HEAD OF THE ALCOHOL
LAW ENFORCEMENT DIVISION; JODY WILLIAMS, IN HIS OFFICIAL CAPACITY AS THE CHIEF OF POLICE
OF THE CITY OF ASHEBORO, NORTH CAROLINA; AND MAYNARD B. REID, JR., IN HIS OFFICIAL
CAPACITY AS THE SHERIFF OF RANDOLPH COUNTY, DEFENDANTS

No. COA16-161

Filed 7 February 2017

Declaratory Judgments—justiciability—electronic sweepstakes

The trial court erred by granting defendants' motion to dismiss a claim for declaratory and injunctive relief on the grounds of justiciability where a promotional rewards program was deemed to have the elements of an illegal electronic sweepstakes. Uncertainty about whether the rewards program violated North Carolina's gambling and sweepstakes statutes impacted plaintiffs' ability to operate a business.

Appeal by plaintiffs from order entered 19 November 2015 by Judge Michael D. Duncan in Randolph County Superior Court. Heard in the Court of Appeals 24 August 2016.

Morningstar Law Group, by William J. Brian, Jr. and Keith P. Anthony, for plaintiffs-appellants.

Joshua H. Stein, Attorney General, by Hal F. Askins, Special Deputy Attorney General, and J. Joy Strickland, Assistant Attorney General, for defendants-appellees Patrick McCrory, Frank L. Perry, and Mark J. Senter.

Cranfill Sumner & Hartzog LLP, by Jaye E. Bingham-Hinch and Patrick H. Flanagan, for defendant-appellee Jody Williams.

No brief filed on behalf of defendant-appellee Maynard B. Reid, Jr.

DAVIS, Judge.

This case requires us to revisit the issue of whether lawsuits brought by companies in the business of licensing and distributing promotional

T & A AMUSEMENTS, LLC v. McCrory

[251 N.C. App. 904 (2017)]

rewards programs seeking declaratory and injunctive relief as to the legality of those programs are barred by sovereign immunity or are otherwise nonjusticiable. Crazie Overstock Promotions, LLC (“Crazie Overstock”) and T and A Amusements, LLC (“T&A”) (collectively “Plaintiffs”) argue that the trial court erred in dismissing their amended complaint pursuant to Rules 12(b)(1), (2), and (6) of the North Carolina Rules of Civil Procedure. Because we conclude that Plaintiffs’ claims are neither barred by sovereign immunity nor nonjusticiable, we reverse the trial court’s order and remand for further proceedings.

Factual and Procedural Background

Crazie Overstock, a retailer of various discount goods, licenses “retail establishments” to promote and display its goods, which may then be purchased through Crazie Overstock’s website. Customers may purchase items through the website with either a credit card or an electronic gift certificate. In order to incentivize the sale of such gift certificates, Crazie Overstock has created a promotional rewards program (the “CO Rewards Program”).

The CO Rewards Program allows customers to receive a certain number of “game points” for each dollar of gift certificates they purchase through kiosks located in the retail establishments. Game points may then be used to play “reward games” on machines in these establishments. The reward games require no skill, and their results are determined randomly. Customers who are successful at reward games receive “reward points” as a result. Reward points, in turn, may be used by the customer to play a “dexterity test,” which tests players’ hand-eye coordination and reflexes by requiring them “to stop a simulated stop-watch within specified ranges.” Customers who are successful at the dexterity test then receive “dexterity points,” which may be redeemed for cash rewards.

T&A is a distributor for Crazie Overstock and, as such, is responsible for recruiting persons to operate retail establishments and for helping to set up and service those establishments. In the spring of 2015, T&A recruited an entity called Mighty Enterprises, LLC (“Mighty Enterprises”) to operate a store in Asheboro, North Carolina. The Mighty Enterprises store, which opened in May 2015, offered the CO Rewards Program to its customers.

Based on their knowledge that the Alcohol Law Enforcement Division (“ALE”) of the North Carolina Department of Public Safety and local law enforcement agencies had previously investigated other businesses offering similar promotional rewards programs, the principals

T & A AMUSEMENTS, LLC v. McCrory

[251 N.C. App. 904 (2017)]

of Mighty Enterprises contacted the Asheboro Police Department and offered to conduct a demonstration of the CO Rewards Program in the hope of demonstrating that the program did not violate North Carolina's gambling and sweepstakes statutes.

On 17 June 2015, a demonstration of the CO Rewards Program was conducted for Detective Daniel Shropshire of the Asheboro Police Department and Agent Stephen Abernathy of ALE. After the demonstration, the officers stated that they would review the legality of the CO Rewards Program with their respective supervisors as well as the district attorney.

On 25 June 2015, Detective Shropshire contacted Dawn Moffitt, a principal of Mighty Enterprises, to inform her that "the City Police Chief, the ALE, the Office of the District Attorney, and the Randolph [County] Sheriff considered the CO Rewards Program to have the same elements of an illegal electronic sweepstakes which violates both the Video Sweepstakes Law and the Gambling Statutes." He also warned Moffitt that "if Mighty Enterprises did not cease all operations, including the CO Rewards Program[,] by June 30, 2015, she and the other principals and employees of Mighty Enterprises would be charged criminally, and . . . the company's equipment and other personal property would be confiscated." As a result, Mighty Enterprises shut down its operations until the legality of the CO Rewards Program could be determined by a court.

On 20 August 2015, Plaintiffs filed the present action in Randolph County Superior Court requesting, *inter alia*, that the trial court (1) declare that the CO Rewards Program does not violate North Carolina law; and (2) enjoin the defendants from taking law enforcement action against retail establishments for offering the CO Rewards Program. The complaint named as defendants Patrick McCrory, Governor of North Carolina; Frank L. Perry, Secretary of the North Carolina Department of Public Safety; Mark J. Senter, Branch Head of ALE; Jody Williams, Asheboro Police Chief; and Maynard B. Reid, Jr., Sheriff of Randolph County (collectively "Defendants"). All of the defendants were sued solely in their official capacities.

Plaintiffs alleged in their amended complaint that "ALE and other state officials desire to eradicate all electronic sweepstakes or electronic rewards programs from the State of North Carolina, including the CO Rewards Program, without regard to whether such sweepstakes or rewards programs violate the Gambling Statutes or the Video Sweepstakes Statute, or other applicable law." Plaintiffs also asserted that ALE officers, in conjunction with local law enforcement agencies,

T & A AMUSEMENTS, LLC v. McCrory

[251 N.C. App. 904 (2017)]

have participated in numerous raids of businesses offering rewards programs, resulting in both threatened and actual prosecutions. Plaintiffs further alleged that “[a]s a direct result of threats by ALE and increased activity by ALE and other local and state officials, [T&A] and Crazie Overstock are being harmed because current and potential Retail Establishments are afraid to offer the CO Rewards Program, even though that program complies fully with all applicable laws.”

On 1 October 2015, Defendants McCrory, Perry, and Senter filed a motion to dismiss pursuant to Rule 12(b)(1) based on sovereign immunity and under Rule 12(b)(6) on the ground that the complaint failed to state a claim upon which relief could be granted against them. On 7 October 2015, Chief Williams filed a motion to dismiss under Rules 12(b)(1), (2), and (6) in which he asserted that Plaintiffs’ claims against him were “barred by sovereign and/or government immunity” and that Plaintiffs had failed to show the existence of an actual controversy.

A hearing on Defendants’ motions was held on 12 October 2015 before the Honorable Michael D. Duncan. The arguments at the hearing were limited to the issues of whether Defendants were entitled to sovereign or governmental immunity and whether a justiciable controversy existed. The trial court issued an order on 19 November 2015 granting Defendants’ motions and concluding that (1) dismissal of Plaintiffs’ claims was proper under Rule 12(b)(6); and (2) “in the absence of any allegation of waiver, sovereign/governmental immunity bars the Plaintiff[s]’ claims against all of the Defendants in this action pursuant both to Rule 12(b)(1) and Rule 12(b)(2)”¹ Plaintiffs filed a timely notice of appeal.

Analysis

Plaintiffs argue on appeal that the trial court erred in granting Defendants’ respective motions to dismiss because (1) neither sovereign nor governmental immunity bars this action; and (2) Plaintiffs’

1. Our review of the hearing transcript reveals that no arguments were made at the 12 October 2015 hearing on the issue of whether the CO Rewards Program actually violated any North Carolina statutes. Nor do the parties contend on appeal that the trial court’s ruling was based upon that issue. Accordingly, we construe the trial court’s order as based solely on the issues of immunity and justiciability. See *Myers v. McGrady*, 170 N.C. App. 501, 509, 613 S.E.2d 334, 340 (2005) (“Where the record does not contain anything in the pleadings, transcripts, or otherwise, to indicate that an issue was presented to the trial court we refuse to address the issue for the first time on appeal.” (citation, quotation marks, ellipses, and brackets omitted)), *rev’d on other grounds*, 360 N.C. 460, 628 S.E.2d 761 (2006).

T & A AMUSEMENTS, LLC v. McCrory

[251 N.C. App. 904 (2017)]

pleadings demonstrated the existence of a justiciable controversy. We address each of these issues in turn.

I. Sovereign Immunity

Under the doctrine of sovereign immunity, “a state may not be sued in its own courts or elsewhere unless by statute it has consented to be sued or has otherwise waived its immunity from suit.” *N.C. Ins. Guar. Ass’n v. Bd. of Trs. of Guilford Tech. Cmty. Coll.*, 364 N.C. 102, 107, 691 S.E.2d 694, 697 (2010) (citation omitted). This immunity encompasses “subordinate division[s] of the state, or agenc[ies] exercising statutory governmental functions” *Id.* (citation omitted). Where, as here, public officials are sued in their official capacities, the claims against them are deemed to be claims against the entities for which they are employed. *See Moore v. City of Creedmoor*, 345 N.C. 356, 367, 481 S.E.2d 14, 21 (1997) (“[O]fficial-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent.” (citation and quotation marks omitted)).²

However, our Supreme Court has recognized the existence of a limited exception to sovereign immunity in certain cases where plaintiffs seek declaratory or injunctive relief against State agencies that act “in excess of the authority granted [to them] under [a] statute and invade or threaten to invade personal or property rights of a citizen in disregard of the law.” *Charlotte-Mecklenburg Hosp. Auth. v. N.C. Indus. Comm’n*, 336 N.C. 200, 208, 443 S.E.2d 716, 721 (1994), *superseded by statute on other grounds as stated in Mehaffey v. Burger King*, 367 N.C. 120, 749 S.E.2d 252 (2013).

North Carolina’s appellate courts have recently applied this principle in *Sandhill Amusements, Inc. v. Sheriff of Onslow County*, 236 N.C.

2. As an initial matter, with regard to Plaintiffs’ claims against Chief Williams, the parties disagree as to whether the State’s sovereign immunity — if otherwise applicable in this case — would cover him given that he is a local official rather than a State official. It is true that the doctrine of *governmental* immunity generally applies to local entities whereas *sovereign* immunity applies to State entities and that sovereign immunity is broader in scope than governmental immunity. *See Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 335 n.1, 678 S.E.2d 351, 353 n.1 (2009) (noting that immunity possessed by county agencies is “identified as governmental immunity, while sovereign immunity applies to the State and its agencies”); *Evans v. Hous. Auth. of City of Raleigh*, 359 N.C. 50, 53, 602 S.E.2d 668, 670 (2004) (explaining that governmental and sovereign “immunities do not apply uniformly”). Plaintiffs argue that local law enforcement entities are not entitled to the State’s sovereign immunity even when sued for declaratory or injunctive relief (rather than for monetary damages) in lawsuits arising from enforcement of state laws. However, we need not resolve this issue because, for the reasons explained below, we hold that sovereign immunity does not serve as a bar to Plaintiffs’ claims in this action.

T & A AMUSEMENTS, LLC v. McCrory

[251 N.C. App. 904 (2017)]

App. 340, 762 S.E.2d 666 (2014), *rev'd per curiam for the reasons stated in the dissenting opinion*, 368 N.C. 91, 773 S.E.2d 55 (2015), which rejected a similar sovereign immunity argument raised by a defendant on analogous facts. In that case, one of the plaintiffs, Gift Surplus, LLC (“Gift Surplus”), licensed to retail stores certain “sweepstakes promotion devices used to promote the sale of gift cards and e-commerce business.” *Sandhill Amusements*, 236 N.C. App. at 341 n.1, 762 S.E.2d at 669 n.1. Through kiosks provided by Gift Surplus, customers could purchase gift certificates to use in Gift Surplus’s online store. When customers bought these gift certificates, they also received credits to play electronic games on the kiosks. The first phase of these games was based purely on chance while the second phase required players to make a judgment regarding which way to turn a reel. *Id.* at 343, 762 S.E.2d at 670. Another plaintiff, Sandhill Amusements, LLC (“Sandhill”), was the distributor of Gift Surplus’s kiosks in the Onslow County, North Carolina area. *Id.* at 344 n.1, 762 S.E.2d at 669 n.1.

After receiving complaints regarding these games, officers from the Onslow County Sheriff’s Office visited a store featuring Gift Surplus kiosks and documented how the machines worked. After subsequently receiving an opinion from ALE that the kiosks were “illegal video sweepstakes machines,” the sheriff and the district attorney sent a letter to the owner of Sandhill warning him that if the promotion was not stopped the kiosks would be seized as evidence and persons in possession of them would be criminally prosecuted. *Id.* at 344, 762 S.E.2d at 670. As a result of this letter, Sandhill removed kiosks from two Onslow County locations and decided not to place kiosks in five other locations. *Id.*

Sandhill and Gift Surplus filed a lawsuit against the sheriff and the district attorney³ seeking a declaration that the promotion was “not prohibited gambling, lottery or gaming products” and an injunction against further enforcement action by the defendants in relation to the promotion. *Id.* at 344, 762 S.E.2d at 671. The sheriff moved to dismiss under Rules 12(b)(1), (2), and (6) based in part on sovereign immunity and the absence of a justiciable controversy. The trial court denied the motion to dismiss and entered a preliminary injunction barring the sheriff from initiating criminal action against the plaintiffs in connection with the promotion. *Id.* at 345, 762 S.E.2d at 671.

In a divided opinion by this Court, the majority disagreed with the sheriff’s argument that the plaintiffs’ claims were barred by sovereign

3. The plaintiffs subsequently dismissed the district attorney as a party to the action.

T & A AMUSEMENTS, LLC v. McCrory

[251 N.C. App. 904 (2017)]

immunity, explaining that because “the declaratory judgment procedure is the only method by which Plaintiffs have recourse to protect their property interests in the kiosks, we hold that . . . sovereign immunity did not bar Plaintiffs’ claim for injunctive relief.” *Id.* at 351, 762 S.E.2d at 675. After further determining that the plaintiffs had shown the existence of a justiciable controversy, the majority considered the merits of the appeal and ultimately affirmed in part and vacated in part the preliminary injunction that the trial court had issued. *Id.* at 357, 762 S.E.2d at 679.

The dissenting judge filed a separate opinion stating his agreement with the majority’s determination of the immunity and justiciability issues but concluding that the preliminary injunction should be vacated in its entirety because the plaintiffs had failed to demonstrate a likelihood that they would ultimately be able to prove that the promotion did not violate North Carolina’s sweepstakes statute. *Id.* at 358, 762 S.E.2d at 679 (Ervin, J., dissenting).

The State appealed to our Supreme Court, which reversed the majority in a *per curiam* opinion “[f]or the reasons stated in the dissenting opinion[.]” *Sandhill Amusements*, 368 N.C. at 91, 773 S.E.2d at 56. Accordingly, the determination that sovereign immunity did not bar the plaintiffs’ claims — which was agreed to by both the majority and the dissent and was left undisturbed by the Supreme Court — continues to have precedential value and serves to foreclose Defendants’ sovereign immunity argument in the present case.

Defendants argue, in the alternative, that even if sovereign immunity does not serve as an absolute bar to this type of lawsuit, they are nevertheless entitled to immunity based on Plaintiffs’ failure to expressly plead a waiver. *See Can Am S., LLC v. State*, 234 N.C. App. 119, 125, 759 S.E.2d 304, 309 (“Sovereign immunity is not merely a defense to a cause of action; it is a bar to actions that requires a plaintiff to establish a waiver of immunity.” (citation omitted)), *disc. review denied*, 367 N.C. 791, 766 S.E.2d 624 (2014).

Citing *Phillips v. Orange County Health Department*, 237 N.C. App. 249, 765 S.E.2d 811 (2014), Plaintiffs respond by contending that because sovereign immunity does not apply at all in this context, it is illogical to require them to have pled a waiver of such immunity. *See id.* at 256-57, 765 S.E.2d at 817 (“It is true that plaintiffs failed to allege that [the defendant] had waived . . . immunity in their complaint. . . . Although defendant enjoys . . . immunity, such immunity does not bar the claims brought by plaintiffs in the instant case. Therefore, this argument is overruled.”).

T & A AMUSEMENTS, LLC v. McCrory

[251 N.C. App. 904 (2017)]

However, we need not resolve this issue because even assuming — without deciding — that such a pleading requirement existed, Plaintiffs met that burden in paragraph 89 of their amended complaint by alleging that “Defendants are not entitled to sovereign immunity” While Defendants argue that the waiver language contained in this paragraph was legally insufficient because it failed to plead with specificity a recognized exception to sovereign immunity, we have previously held that “precise language alleging that the State has waived the defense of sovereign immunity is not necessary, but, rather, the complaint need only contain sufficient allegations to provide a reasonable forecast of waiver.” *Can Am S.*, 234 N.C. App. at 125, 759 S.E.2d at 309 (citation, quotation marks, and brackets omitted); *see also Fabrikant v. Currituck Cty.*, 174 N.C. App. 30, 38, 621 S.E.2d 19, 25 (2005) (“[A]s long as the complaint contains sufficient allegations to provide a reasonable forecast of waiver, precise language alleging that the State has waived the defense of sovereign immunity is not necessary.”).⁴

Accordingly, even if Plaintiffs were, in fact, required to specifically plead a waiver of Defendants’ sovereign immunity in their complaint, they met that burden because the above-quoted language in paragraph 89 in conjunction with the substantive allegations in their amended complaint clearly served to “provide a reasonable forecast of waiver.” *See Can Am S.*, 234 N.C. App. at 125, 759 S.E.2d at 309 (citation and quotation marks omitted). Thus, we hold that the trial court erred in dismissing this action based on sovereign immunity.

II. Justiciability

Plaintiffs also argue that the trial court erred in dismissing this action pursuant to Rule 12(b)(6) based on their failure to present a justiciable controversy.⁵ Pursuant to the North Carolina Declaratory

4. We note that at oral argument counsel for Defendants were unable to state precisely how such a waiver allegation should have been worded in Plaintiffs’ pleadings in order to properly allege a waiver of sovereign immunity.

5. While the trial court appears to have viewed Rule 12(b)(6) as the appropriate provision of Rule 12 under which to dismiss a claim on nonjusticiability grounds, the failure to present a justiciable controversy is actually an issue of subject matter jurisdiction and, therefore, within the scope of Rule 12(b)(1). *See Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 584, 347 S.E.2d 25, 29 (1986) (“[I]n order for a court to have subject matter jurisdiction to render a declaratory judgment, an actual controversy must exist between the parties”); *Yeager v. Yeager*, 228 N.C. App. 562, 565, 746 S.E.2d 427, 430 (2013) (“[A] trial court does not have subject matter jurisdiction over a non-justiciable claim.”).

T & A AMUSEMENTS, LLC v. McCrory

[251 N.C. App. 904 (2017)]

Judgment Act, “[a]ny person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status, or other legal relations thereunder.” N.C. Gen. Stat. § 1-254 (2015). In construing this statute, the Supreme Court has explained that

[a]lthough a declaratory judgment action must involve an actual controversy between the parties, plaintiffs are not required to allege or prove that a traditional cause of action exists against defendants in order to establish an actual controversy. A declaratory judgment should issue (1) when it will serve a useful purpose in clarifying and settling the legal relations at issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceeding.

Goldston v. State, 361 N.C. 26, 33, 637 S.E.2d 876, 881 (2006) (internal citations, quotation marks, and brackets omitted). The Supreme Court has also stated that “[p]laintiffs are not required to sustain actual losses in order to make a test case; such a requirement would thwart the remedial purpose of the Declaratory Judgment Act.” *Charlotte-Mecklenburg Hosp. Auth.*, 336 N.C. at 214, 443 S.E.2d at 725 (citation, quotation marks, and brackets omitted).

We have addressed on several prior occasions the issue of whether justiciable controversies existed under the Declaratory Judgment Act where plaintiffs alleged that law enforcement agencies were improperly seeking to prohibit them from offering promotional rewards programs. Most recently, in *Sandhill Amusements* — as discussed above — a disagreement existed between the plaintiffs and the sheriff, the district attorney, and ALE regarding the legality of the kiosks that Gift Surplus licensed and Sandhill distributed to retail stores. *Sandhill Amusements*, 236 N.C. App. at 356, 762 S.E.2d at 678. The controversy culminated in the sheriff and district attorney sending the owner of Sandhill a letter threatening enforcement action. *Id.*

The majority in this Court held that a justiciable controversy existed given that the plaintiffs’ allegations centered on “whether the kiosks at issue were illegal and the uncertainty concerning the legality of these kiosks ultimately impacts Plaintiffs’ ability to operate a business going forward.” *Id.* at 357, 762 S.E.2d at 678. As further support for its conclusion that the plaintiffs’ claims were justiciable, the majority noted that the “Plaintiffs alleged in their complaint that, since Sheriff Brown issued

T & A AMUSEMENTS, LLC v. McCrory

[251 N.C. App. 904 (2017)]

the . . . letter [threatening criminal action], existing retail outlets that used Plaintiffs' products had removed the kiosks or chosen not to use the kiosks due to the uncertainty surrounding their legality." *Id.*⁶

In making this determination, the majority relied upon our decision in *American Treasures, Inc. v. State*, 173 N.C. App. 170, 617 S.E.2d 346 (2005). In that case, the plaintiff, Treasured Arts, Inc. ("Treasured Arts"), was in the business of selling pre-paid long-distance phone cards, which it distributed through convenience stores. Attached to each phone card was a free promotional "scratch-off" game piece that allowed purchasers to win cash awards. Although the State did not actually bring — or even threaten — enforcement action against Treasured Arts itself, Treasured Arts received reports that ALE agents were threatening to revoke the alcoholic beverage licenses of convenience stores carrying its phone cards on the ground that the accompanying promotional scratch-off game constituted illegal gambling. *Id.* at 173-74, 617 S.E.2d at 348.

The plaintiff brought an action for declaratory and injunctive relief against the Governor, the Department of Crime Control and Public Safety, and ALE to determine the legality of the promotion. The trial court entered an order declaring that the promotion did not constitute illegal gambling and enjoining the defendants from interfering with the alcohol licenses or sale of Treasured Arts' phone cards by convenience stores. *Id.* at 174, 617 S.E.2d at 349.

On appeal, this Court rejected the defendants' argument that the plaintiffs had failed to show a justiciable controversy. We acknowledged that, as a general matter, "courts of equity are without jurisdiction to interfere by injunction to restrain a criminal prosecution for the violation of statutes . . . whether it has been merely threatened or has already been commenced." *Id.* at 175, 617 S.E.2d at 349 (citation, quotations marks, ellipses, and brackets omitted). However, citing our Supreme Court's decision in *McCormick v. Proctor*, 217 N.C. 23, 6 S.E.2d 870 (1940), we explained that "equity may nevertheless be invoked as an exception to those principles and may operate to 'interfere, even to prevent criminal prosecutions, when this is necessary to protect effectually property rights and to prevent irremediable injuries to the rights of persons.'" *American Treasures*, 173 N.C. App. at 175, 617 S.E.2d at 349 (quoting *McCormick*, 217 N.C. at 29, 6 S.E.2d at 874).

6. The dissent in *Sandhill Amusements* — which, as noted above, was adopted by our Supreme Court — stated its agreement with the majority's holding regarding the justiciability of the plaintiffs' claims. *See id.* at 358, 762 S.E.2d at 679 (Ervin, J., dissenting).

T & A AMUSEMENTS, LLC v. McCrory

[251 N.C. App. 904 (2017)]

We ultimately concluded that the complaint in *American Treasures* presented a justiciable controversy because “the declaratory judgment procedure is the only way plaintiff can protect its property rights and prevent ALE from foreclosing the sale of its product in convenience stores.” *Id.* at 176, 617 S.E.2d at 350. Moreover, we noted that although “[t]here is no indication in the record that a prosecution is pending against plaintiff,” the existence of an actual prosecution was not necessary in order to present a justiciable controversy “in light of the State’s ability to curtail the sale of plaintiff’s product by threatening retail stores with the loss of their alcohol licenses upon failure to cease such sales.” *Id.*⁷

In the present case, Plaintiffs have presented a justiciable controversy for reasons similar to those set forth in *Sandhill Amusements* and *American Treasures*. Plaintiffs are the licensor and distributor of the CO Rewards Program, which law enforcement officers have determined to be in violation of North Carolina’s criminal laws. Moreover, officers have threatened criminal enforcement action against establishments offering this promotion, and such threats impede Plaintiffs’ ability to license and distribute the program. Therefore, the uncertainty as to whether the CO Rewards Program violates North Carolina’s gambling and sweepstakes statutes “impacts Plaintiffs’ ability to operate a business going forward.” *Sandhill Amusements*, 236 N.C. App. at 357, 762 S.E.2d at 678. Accordingly, we conclude that because Plaintiffs have presented a justiciable controversy, the trial court erred in granting Defendants’ motions to dismiss on the ground of nonjusticiability.⁸

7. There are a number of other reported decisions in which our appellate courts have reached the merits of declaratory judgment claims involving the proper construction of North Carolina’s gambling statutes without first explicitly addressing the issue of justiciability. *See, e.g., Joker Club, L.L.C. v. Hardin*, 183 N.C. App. 92, 93, 643 S.E.2d 626, 628 (2007) (declaratory judgment as to legality of poker club plaintiff planned to open); *Collins Coin Music Co. of N.C. v. N.C. Alcoholic Beverage Control Comm’n*, 117 N.C. App. 405, 405, 451 S.E.2d 306, 307 (1994) (declaratory judgment regarding whether video games offered by plaintiff were illegal slot machines), *disc. review denied*, 340 N.C. 110, 456 S.E.2d 312 (1995); *Animal Prot. Soc’y of Durham, Inc. v. State*, 95 N.C. App. 258, 262, 382 S.E.2d 801, 803 (1989) (declaratory and injunctive relief sought as to whether charitable sales promotion violated bingo statute). Defendants here have failed to offer any valid explanation as to why the controversies existing in those cases were justiciable while the present action is not.

8. We express no opinion on the ultimate issue in this litigation as to whether the CO Rewards Program is legal under North Carolina law.

TROPIC LEISURE CORP. v. HAILEY

[251 N.C. App. 915 (2017)]

Conclusion

For the reasons stated above, we reverse the trial court's 19 November 2015 order and remand for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Judges CALABRIA and TYSON concur.

TROPIC LEISURE CORP., MAGEN POINT, INC. D/B/A
MAGENS POINT RESORT, PLAINTIFFS

v.

JERRY A. HAILEY, DEFENDANT

No. COA15-1254-2

Filed 7 February 2017

This opinion supersedes and replaces the opinion filed 16 August 2016.

**Constitutional Law—small claims court—Virgin Islands—no
counsel allowed—due process—full faith and credit**

A judgment from the small claims division of the Virgin Islands Superior Court was not entitled to full faith and credit in North Carolina because it was obtained in a manner that denied defendant due process. Defendant was not allowed to be represented by counsel in small claims court, which was the only stage at which facts were determined; could not opt out of small claims court; and appeal from small claims court involved only legal issues.

Appeal by defendant from order entered 10 September 2015 by Judge Debra Sasser in Wake County District Court. Heard in the Court of Appeals 25 May 2016. Opinion filed 16 August 2016. Petition for rehearing granted 30 September 2016. The following opinion supersedes and replaces the opinion filed 16 August 2016.

*Warren, Shackleford & Thomas, P.L.L.C., by R. Keith Shackleford,
for plaintiffs-appellees.*

*The Armstrong Law Firm, P.A., by L. Lamar Armstrong, Jr. and
Daniel K. Keeney, for defendant-appellant.*

TROPIC LEISURE CORP. v. HAILEY

[251 N.C. App. 915 (2017)]

DAVIS, Judge.

This case presents the question of whether a North Carolina court must give full faith and credit to a judgment rendered in a foreign jurisdiction under procedural rules prohibiting the defendant from being represented by counsel at trial. Jerry A. Hailey (“Defendant”) appeals from an order denying his motion for relief from a foreign judgment that Tropic Leisure Corp. and Magens¹ Point, Inc., d/b/a Magens Point Resort (collectively “Plaintiffs”) sought to enforce against him in North Carolina. On appeal, Defendant argues that the foreign judgment should not be enforced because it was rendered in violation of his due process rights. After careful review, we vacate the trial court’s order.

Factual and Procedural Background

On 2 April 2014, Plaintiffs, who are corporations organized under the laws of the United States Virgin Islands, obtained a default judgment (the “Judgment”) in the small claims division of the Virgin Islands Superior Court against Defendant, who is a resident of North Carolina, in the amount of \$5,764.00 plus interest and costs. Defendant did not appeal the default judgment. On 17 February 2015, Plaintiffs filed a Notice of Filing Foreign Judgment in Wake County District Court along with a copy of the Judgment and a supporting affidavit.

Defendant filed a motion for relief from foreign judgment on 6 April 2015 in which he argued that the Judgment was not entitled to full faith and credit in North Carolina because it was obtained in violation of his constitutional rights and was against North Carolina public policy. Plaintiffs subsequently filed a motion to enforce the foreign judgment.

The parties’ motions were heard before the Honorable Debra Sasser on 30 July 2015. On 10 September 2015, the trial court entered an order denying Defendant’s motion for relief and concluding that Plaintiffs were entitled to enforcement of the Judgment under the Full Faith and Credit Clause of the United States Constitution, U.S. Const. art. IV, § 1, and North Carolina’s Uniform Enforcement of Foreign Judgments Act (“UEFJA”), N.C. Gen. Stat. §§ 1C-1701 *et seq.* Defendant filed a timely notice of appeal.

1. While this entity’s name appears as “Magen Point, Inc.” in the trial court’s order, it is referred to elsewhere in the record as “Magens Point, Inc.”

TROPIC LEISURE CORP. v. HAILEY

[251 N.C. App. 915 (2017)]

Analysis

On appeal, Defendant argues that the trial court erred in extending full faith and credit to the Judgment. This issue involves a question of law, which we review *de novo*. See *DOCRX, Inc. v. EMI Servs. of N.C., LLC*, 367 N.C. 371, 375, 758 S.E.2d 390, 393, *cert. denied*, ___ U.S. ___, 135 S. Ct. 678, 190 L. Ed. 2d 390 (2014) (applying *de novo* review to whether Full Faith and Credit Clause required North Carolina to enforce foreign judgment).

I. UEFJA

The Full Faith and Credit Clause “requires that the judgment of the court of one state must be given the same effect in a sister state that it has in the state where it was rendered.”² *State of New York v. Paugh*, 135 N.C. App. 434, 439, 521 S.E.2d 475, 478 (1999) (citation omitted). “[B]ecause a foreign state’s judgment is entitled to only the same validity and effect in a sister state as it had in the rendering state, the foreign judgment must satisfy the requisites of a valid judgment under the laws of the rendering state before it will be afforded full faith and credit.” *Bell Atl. Tricon Leasing Corp. v. Johnnie’s Garbage Serv., Inc.*, 113 N.C. App. 476, 478-79, 439 S.E.2d 221, 223, *disc. review denied*, 336 N.C. 314, 445 S.E.2d 392 (1994).

The UEFJA “governs the enforcement of foreign judgments that are entitled to full faith and credit in North Carolina.” *Lumbermans Fin., LLC v. Poccia*, 228 N.C. App. 67, 70, 743 S.E.2d 677, 679 (2013) (citation and quotation marks omitted). In order to domesticate a foreign judgment under the UEFJA, a party must file a properly authenticated foreign judgment with the office of the clerk of superior court in any North Carolina county along with an affidavit attesting to the fact that the foreign judgment is both final and unsatisfied in whole or in part and setting forth the amount remaining to be paid on the judgment. See N.C. Gen. Stat. § 1C-1703(a) (2015).

The introduction into evidence of these materials “establishes a presumption that the judgment is entitled to full faith and credit.” *Meyer v. Race City Classics, LLC*, 235 N.C. App. 111, 114, 761 S.E.2d 196, 200,

2. The Full Faith and Credit Clause applies to the Virgin Islands because it is a territory of the United States. See 48 U.S.C. § 1541 (designating the Virgin Islands as a territory); 28 U.S.C. § 1738 (applying Full Faith and Credit Clause to judgments filed “in every court within the United States and its Territories and Possessions”); see also *Bergen v. Bergen*, 439 F.2d 1008, 1013 (3d Cir. 1971) (holding that the Full Faith and Credit Clause “is applicable to judgments of the Territory of the Virgin Islands”).

TROPIC LEISURE CORP. v. HAILEY

[251 N.C. App. 915 (2017)]

disc. review denied, 367 N.C. 796, 766 S.E.2d 624 (2014). The party seeking to defeat enforcement of the foreign judgment must “present evidence to rebut the presumption that the judgment is enforceable” *Rossi v. Spoloric*, __ N.C. App. __, __, 781 S.E.2d 648, 654 (2016). A properly filed foreign judgment “has the same effect and is subject to the same defenses as a judgment of this State and shall be enforced or satisfied in like manner[.]” N.C. Gen. Stat. § 1C-1703(c). Thus, a judgment debtor may file a motion for relief from the foreign judgment on any “ground for which relief from a judgment of this State would be allowed.” N.C. Gen. Stat. § 1C-1705(a) (2015).

Our Supreme Court has held that “the defenses preserved under North Carolina’s UEFJA are limited by the Full Faith and Credit Clause to those defenses which are directed to the validity and enforcement of a foreign judgment.” *DOCRX*, 367 N.C. at 382, 758 S.E.2d at 397. In *DOCRX*, the Supreme Court provided the following examples of potential defenses to enforcement of a foreign judgment:

that the judgment creditor committed extrinsic fraud, that the rendering state lacked personal or subject matter jurisdiction, that the judgment has been paid, that the parties have entered into an accord and satisfaction, that the judgment debtor’s property is exempt from execution, that the judgment is subject to continued modification, or that the judgment debtor’s due process rights have been violated.

Id. (emphasis added).

II. Virgin Islands Court System

In the present case, Defendant argues that he was denied due process during the Virgin Islands proceeding because the rules governing small claims cases in that jurisdiction do not (1) permit parties to be represented by counsel; or (2) allow for trial by jury. An understanding of the structure of the Virgin Islands court system is necessary in order to evaluate Defendant’s arguments.

Congress has created the District Court of the Virgin Islands, which possesses jurisdiction equivalent to that of a United States district court. *See* 48 U.S.C. § 1611; *Edwards v. HOVENSA, LLC*, 497 F.3d 355, 358 (3rd Cir. 2007). In addition, the legislature of the Virgin Islands has established (1) the Supreme Court of the Virgin Islands, a court of last resort; and (2) the Superior Court of the Virgin Islands, a trial court of local jurisdiction. V.I. Code Ann. tit. 4, § 2.

TROPIC LEISURE CORP. v. HAILEY

[251 N.C. App. 915 (2017)]

The Virgin Islands Superior Court contains a small claims division “in which the procedure shall be as informal and summary as is consistent with justice.” V.I. Code Ann. tit. 4, § 111. The small claims division has jurisdiction over all civil actions where the amount in controversy does not exceed \$10,000. V.I. Code Ann. tit. 4, § 112(a). In proceedings before the small claims court, “[n]either party may be represented by counsel and parties shall in all cases appear in person except for corporate parties, associations and partnerships which may appear by a personal representative.” V.I. Code Ann. tit. 4, § 112(d). In addition, small claims cases are heard before a magistrate without a jury. *See* V.I. Super. Ct. R. 64.

In the event that a party is unsatisfied with a judgment in the small claims division, it can appeal to the Appellate Division of the Superior Court. *See H & H Avionics, Inc. v. V.I. Port Auth.*, 52 V.I. 458, 462-63 (2009); V.I. Super. Ct. R. 322.1(a). However, “[n]o additional evidence shall be taken or considered” in the Appellate Division. V.I. Super. Ct. R. 322.3(a). If a party does not agree with the decision of the Appellate Division, it may then appeal to the Supreme Court of the Virgin Islands. *See* V.I. Code Ann. tit. 4, § 32; V.I. Super. Ct. R. 322.7(b); *H & H Avionics*, 52 V.I. at 462-63. Parties are permitted to be represented by counsel on appeal to the Virgin Islands Supreme Court. *See* V.I. Sup. Ct. R. 4(d).

III. Due Process Right to Employ Counsel at Trial

In the present case, Defendant does not dispute the fact that Plaintiffs complied with the UEFJA by filing a properly authenticated copy of the Judgment and an accompanying affidavit in a North Carolina court. Accordingly, Plaintiffs are entitled to a “presumption that the judgment is entitled to full faith and credit.” *Meyer*, 235 N.C. App. at 114, 761 S.E.2d at 200. However, Defendant argues that the Judgment is not entitled to full faith and credit because he was deprived of his right to due process by the rules of the rendering jurisdiction’s small claims court, which does not allow Defendant to be represented by counsel or provide the right to a trial by jury.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that no state may “deprive any person of life, liberty, or property, without due process of law[.]” U.S. Const. amend. XIV, §1. Congress has applied this rule of law to the Virgin Islands through enactment of the Revised Organic Act of the Virgin Islands. *See* 48 U.S.C. § 1561 (“No law shall be enacted in the Virgin Islands which shall deprive any person of life, liberty, or property without due process of law”); *see also United States v. Christian*, 660 F.2d 892, 899 (3d Cir. 1981)

TROPIC LEISURE CORP. v. HAILEY

[251 N.C. App. 915 (2017)]

(noting that 48 U.S.C. § 1561 “expresses the congressional intention to make the federal constitution applicable to the Virgin Islands to the fullest extent possible consistent with its status as a territory.” (citation and quotation marks omitted)). Therefore, we apply “the same due process analysis that would be utilized under the federal constitution.” *Hendrickson v. Reg O Co.*, 657 F.2d 9, 13 n.2 (3d Cir. 1981).

The question of whether a rendering jurisdiction’s prohibition on a party being represented by counsel is a due process violation that can serve as a defense to the enforcement of a foreign judgment presents an issue of first impression in North Carolina. After carefully considering the arguments of the parties in this case and thoroughly reviewing the pertinent caselaw from other jurisdictions, we hold that the Judgment was issued in violation of Defendant’s due process rights because he was not provided a meaningful opportunity to be heard.

“The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.” *Mathews v. Eldridge*, 424 U.S. 319, 333, 47 L. Ed. 2d 18, 32 (1976) (citation and quotation marks omitted). The United States Supreme Court has explained that “[i]f in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.” *Powell v. Alabama*, 287 U.S. 45, 69, 77 L. Ed. 158, 170-71 (1932).

Litigants in most types of civil proceedings are not entitled to court-appointed counsel. However, it has been widely recognized that civil litigants have a due process right to be heard though counsel that they themselves provide. For example, in *Goldberg v. Kelly*, 397 U.S. 254, 25 L. Ed. 2d 287 (1970), the United States Supreme Court explained that

[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. We do not say that counsel must be provided at the pre-termination [of public assistance payments] hearing, but only that the recipient must be allowed to retain an attorney if he so desires. Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient.

Id. at 270-71, 25 L. Ed. 2d at 300 (internal citation and quotation marks omitted).

TROPIC LEISURE CORP. v. HAILEY

[251 N.C. App. 915 (2017)]

A number of state and federal courts have expressly recognized this principle over the past few decades. *See, e.g., Danny B. ex rel. Elliott v. Raimondo*, 784 F.3d 825, 831 (1st Cir. 2015) (“Civil litigants have a constitutional right, rooted in the Due Process Clause, to retain the services of counsel.”); *Anderson v. Sheppard*, 856 F.2d 741, 747 (6th Cir. 1988) (“While case law in the area is scarce, the right of a civil litigant to be represented by retained counsel, if desired, is now clearly recognized.”); *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1118 (5th Cir.) (“[A] civil litigant has a constitutional right to retain hired counsel [T]he litigant usually lacks the skill and knowledge to adequately prepare his case, and he requires the guiding hand of counsel at every step in the proceedings against him.”), *cert. denied*, 449 U.S. 820, 66 L. Ed. 2d 22 (1980); *R.G. v. Hall*, 37 Mass. App. Ct. 410, 412, 640 N.E.2d 492, 493 (1994) (“On due process grounds . . . parties have a constitutional right to retain counsel in a civil case.”); *Aspen Props. Co. v. Preble*, 780 P.2d 57, 58 (Colo. App. 1989) (“A civil litigant’s right to due process of law includes the right to cross-examine witnesses and to have an opportunity for rebuttal. In order to exercise these rights fully, due process requires that civil litigants be allowed to secure assistance of counsel.” (internal citation and quotation marks omitted)).

Courts in several jurisdictions have specifically considered the constitutionality of procedures under which parties are not permitted to be represented by counsel at trial in small claims court. These cases make clear that while due process is satisfied when a party may appeal from a small claims court judgment and receive a trial *de novo* with the opportunity to be represented by counsel, a due process violation occurs where the laws of a jurisdiction prohibit a civil litigant from ever being represented by counsel at the fact-finding stages of the proceedings.

In *Frizzell v. Swafford*, 104 Idaho 823, 663 P.2d 1125 (1983), the Idaho Supreme Court considered whether the procedure governing Idaho’s small claims court was consistent with due process. Under this procedure, litigants were not permitted to be represented by counsel in small claims court, but if a party was dissatisfied with a small claims court judgment, it had the right on appeal to a trial *de novo* in which it could employ counsel. *Id.* at 827, 663 P.2d at 1129. One of the issues presented in *Frizzell* was whether it constituted a deprivation of property without due process of law to permit the prevailing party in a small claims court proceeding to execute on its judgment before the other party had the opportunity to appeal and receive a trial *de novo* with counsel. *Id.*

In analyzing this issue, the Idaho Supreme Court explained that “the constitutional infirmity created by the statutory prohibition of attorneys

TROPIC LEISURE CORP. v. HAILEY

[251 N.C. App. 915 (2017)]

in small claims court was overcome by the fact that an opportunity for a trial *de novo* is always available to the litigants. Counsel can appear in the *de novo* proceeding, and this satisfies the due process requirement.” *Id.* (citation and quotation marks omitted). The court further held that “a small claims court trial is constitutionally incomplete; it cannot stand on its own. *Without the guaranty of a trial de novo, a proceeding in which the litigants are denied counsel is unconstitutional.*” *Id.* (emphasis added).

Similarly, in *Simon v. Lieberman*, 193 Neb. 321, 226 N.W.2d 781 (1975), judgment was entered for the plaintiff in small claims court where, by statute, the parties were not permitted to appear with counsel. The defendant then appealed to the district court for a trial *de novo* as permitted by state law. However, the district court refused to allow the parties to be represented by counsel because the case had originated in the small claims court. The defendant proceeded *pro se*, and after losing his trial in district court he appealed on due process grounds. *Id.* at 322, 226 N.W.2d at 782. On appeal, the Nebraska Supreme Court held that he had been denied due process because “[i]n an appeal to the District Court from a judgment of the small claims court . . . a party has the right to provide his own counsel and appear by such counsel in the District Court.” *Id.* at 326, 226 N.W.2d at 784.

Other jurisdictions have reached similar conclusions. *See, e.g., North Central Servs., Inc. v. Hafdahl*, 191 Mont. 440, 443, 625 P.2d 56, 58 (1981) (small claims court procedure not permitting representation by counsel or providing for trial *de novo* on appeal was “unconstitutional because it effectively denies counsel at all levels of factual determination”); *Windholz v. Willis*, 1 Kan. App. 2d 683, 683, 685, 573 P.2d 1100, 1101-02 (1977) (holding that defendant’s right to due process was violated where he was not permitted “to appear by or with counsel at any stage during which evidence was introduced . . .” but noting that “[t]he exclusion of counsel from the small claims proceeding is not fatal where a trial *de novo* with counsel is available”); *Brooks v. Small Claims Court*, 8 Cal. 3d 661, 665-66, 504 P.2d 1249, 1252 (1973) (reasoning that due process requirements were satisfied because if defendant “is dissatisfied with the judgment of the small claims court he has a right of appeal to the superior court where he is entitled to a trial *de novo*” in which he may appear through counsel).

An alternative method for satisfying due process in this context was recognized in *Johnson v. Capital Ford Garage*, 250 Mont. 430, 820 P.2d 1275 (1991). In that case, Montana’s procedures neither allowed the defendant to be represented by counsel in his small claims court

TROPIC LEISURE CORP. v. HAILEY

[251 N.C. App. 915 (2017)]

trial nor permitted a trial *de novo* from the small claims court judgment. However, pursuant to statute, he was given the opportunity before trial to remove his case from the small claims court docket to a trial court in which he could be represented by counsel. *Id.* at 434, 820 P.2d at 1277.

The defendant argued that this statutory scheme violated his due process rights because it did not provide for a trial *de novo* — in which he could be represented by counsel — on appeal from the small claims court. *Id.* The Montana Supreme Court disagreed, holding that the statutory procedure was consistent with due process

because it does not absolutely prohibit counsel at all stages in the litigation. Instead, it places the responsibility for preservation of that right on the defendant who must choose between the peace of mind that comes from representation by counsel, and the quick, affordable justice available in small claims court. . . .

Id.

These cases demonstrate the constitutional invalidity of the statutory framework in the Virgin Islands for handling small claims cases. Litigants in such cases are prohibited from securing the representation of counsel in the small claims court and are not given the opportunity to either (1) opt out of the small claims court entirely by removing the case to a trial court that permits representation by counsel; or (2) appeal from a small claims court judgment for a trial *de novo* in a court that allows representation by counsel. Instead, the only appeal allowed from the small claims court is to the Appellate Division of the Superior Court where “[n]o additional evidence shall be taken or considered.” *See* V.I. Super. Ct. R. 322.3(a).³

Thus, there is no opportunity whatsoever for a small claims court litigant to be represented by counsel during any portion of the critical fact-finding phase of the litigation. The utility to such a litigant of having his attorney make purely legal arguments during the appellate phase of the proceeding is simply no substitute for the opportunity to have his chosen counsel develop a factual record at trial. Thus, we conclude that

3. We note that it is unclear whether parties may even appear through counsel in the Appellate Division of the Superior Court. *See Wild Orchid Floral & Event Design v. Banco Popular de P.R.*, 62 V.I. 240, 249 (V.I. Super. Ct. 2015) (“[I]t is not at all clear, despite [the plaintiff’s] contention, that counsel[] should be allowed to appear on appeal to the Appellate Division from a case filed in the Small Claims Division and tried in the Magistrate Division[.]”).

TROPIC LEISURE CORP. v. HAILEY

[251 N.C. App. 915 (2017)]

Defendant was denied “the opportunity to be heard at a meaningful time and in a meaningful manner.” *Mathews*, 424 U.S. at 333, 47 L. Ed. 2d at 32 (citation and quotation marks omitted).

Accordingly, because the Judgment was obtained in a manner that denied Defendant his right to due process, it is not entitled to full faith and credit in North Carolina.⁴ The trial court therefore erred in its 10 September 2015 order allowing enforcement of the Judgment.

Conclusion

For the reasons stated above, we vacate the trial court’s 10 September 2015 order and remand to the trial court for any additional steps that may be necessary in order to effectuate our ruling.

VACATED AND REMANDED.

Judges ELMORE and DIETZ concur.

4. Because we hold that the Virgin Islands rule barring Defendant from being represented by counsel in small claims court violated his right to due process — thus rendering the Judgment unenforceable in North Carolina — we need not address Defendant’s companion argument that the lack of a right to a trial by jury was likewise a due process violation.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 7 FEBRUARY 2017)

ABDIN v. CCC-BOONE, LLC No. 16-17	Watauga (14CVS397)	Affirmed
BIZZARRO v. CTY. OF ASHE No. 16-211	Ashe (15CVS320)	Affirmed
BRUNS v. BRYANT No. 16-699	Cumberland (15CVS8375)	Dismissed in Part; Affirmed in Part.
CRAMER v. PERRY No. 16-375	Wake (07CVD11079)	Dismissed
DAWKINS v. WILMINGTON TR. CO. No. 16-240	Mecklenburg (15CVS16227)	Dismissed
EDWARDS v. COLE No. 16-395	Alexander (15CVD329)	Vacated
G.S.C. HOLDINGS, LLC v. McCORRY No. 16-160	Randolph (15CVS1732)	Reversed and Remanded
IN RE C.A.W. No. 16-668	Guilford (14JT302)	Affirmed
IN RE D.A.W. No. 16-719	Pender (15JT22)	Vacated and Remanded
IN RE E.C. No. 16-736	Surry (14JA22-23)	Affirmed
IN RE FORECLOSURE OF IANNUCCI No. 16-738	Buncombe (15SP261)	Affirmed
IN RE H.S. No. 16-749	Bladen (13JA37)	Affirmed
IN RE J.H. No. 16-732	Robeson (13JT46) (13JT47) (13JT64)	Affirmed
IN RE P.M. No. 16-775	Mecklenburg (15JA503)	Affirmed
IN RE R.D. No. 16-660	Henderson (16JA1) (16JA2)	Affirmed

IN RE S.C.H. No. 16-790	Robeson (13JA130) (16JA2)	Affirmed
IN RE T.Y. No. 16-623	Lee (13JT104-107)	Affirmed
IN RE WADSWORTH No. 16-370	Watauga (13E70)	AFFIRMED IN PART; DISMISSED IN PART AS MOOT.
IN RE Y.L.M.C. No. 16-662	Wake (13JT660-662)	Affirmed
IN RE Z.A.W. No. 16-833	Alamance (15JT150-151)	Affirmed
PARKER v. COLSON No. 16-780	Anson (15CVS102)	Dismissed
STATE v. ADAMS No. 16-397	New Hanover (12CRS58024) (12CRS9328)	No Error
STATE v. ARNOLD No. 16-667	Ashe (14CRS50561-62) (14CRS50882) (15CRS100)	Affirmed
STATE v. BROCKINGTON No. 16-516	Mecklenburg (14CRS233415-17) (14CRS233420) (14CRS233422) (14CRS248893)	No Error
STATE v. CESNIK No. 16-590	Wake (14CRS224935)	Affirmed
STATE v. CROWDER No. 16-269	Mecklenburg (14CRS204013) (14CRS20700)	NO ERROR IN PART; REMANDED FOR RESENTENCING
STATE v. HARGETT No. 16-452	Craven (12CRS52460-61) (14CRS837-839)	No Error
STATE v. ROGERS No. 16-15	Wake (12CRS11750) (12CRS213646)	No Error

STATE v. SYMMES No. 16-579	Rockingham (14CRS54122) (15CRS131)	No Error
STATE v. THOMPSON No. 16-459	Columbus (14CRS51130)	No Error
STATE v. WEAVER No. 16-378	Currituck (12CRS845) (12CRS846)	Affirmed
TERRY v. STATE OF N.C. No. 16-153	Wake (14CVS12342)	Affirmed
WESTON MEDSURG CTR., PLLC v. BLACKWOOD No. 16-621	Mecklenburg (13CVS17539) (14CVS8092)	Affirmed in part; remanded in part

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